2011 WL 7005017 (Minn.Dist.Ct.) (Trial Motion, Memorandum and Affidavit)
District Court of Minnesota,
Sixth Judicial District.
St. Louis County

Alan MEINERSHAGEN, Plaintiff,

v.

Stefan J. KONASIEWICZ, M.D., and St. Luke's Hospital of Duluth, Defendants.

No. 69DU-CV-10-2255.
September 9, 2011.

Plaintiff's Memorandum of Law in Support of His Motion for Judgment as a matter of Law or, in the Alternative, a new Trial of September 8, 2011

Law Offices of Richard E. Bosse, Chartered, Richard E. Bosse #0245, Attorney for Plaintiff, 303 Douglas Avenue, PO Box 315, Henning, MN 56551, (218) 583-4342.

Case Type: Medical Negligence

COMES NOW, the Plaintiff, Alan Meinershagen, by and through his undersigned attorney, and files this Memorandum of law in Support of his Motion for Judgment as a Matter of Law pursuant to Rule 50 of the Minnesota Rules of Civil Procedure or, in the Alternative, a New Trial pursuant to Rule 59 of the Minnesota Rules of Civil Procedure and says:

INTRODUCTION

This case arises from a medical negligence suit brought by Plaintiff, Alan Meinershagen, against Defendants Stefan J. Konasiewicz, M.D., and St. Luke's Hospital of Duluth. The suit arises because Dr. Konasiewicz's care of Mr. Meinershagen fell below the standard of care when he performed an invasive brain biopsy on Mr. Meinershagen with indeterminative CT scan as to whether the patient had suffered a minor stroke or a tumor. The proper standard of care for a patient such as Mr. Meinershagen was serial CT and/or MRI scans to determine the nature and etiology of the brain mass. Instead Dr. Konasiewicz undertook the most aggressive course possible and conducted an invasive brain biopsy which resulted in negative pathology for a tumor and which was the proximate cause of severe life altering injuries to Mr. Meinershagen including intraparenchymal hemorrhage [1] within the area of the biopsied lesion, post-operative seizure, dense left hemiplegia [2], severe cerebral dysfunction and brain injury resulting in cognitive deficits, speech impairment and inability to walk. Dr. Konasiewicz's surgical procedure turned a minor infarct (stroke) into a major hemorrhage (bleed) violating the most sacred Hippocratic oath of a “physician shall do not harm”.

STATEMENT OF ISSUES

A. A judgment as a matter of law or a new trial should be granted the Plaintiff on the grounds of error of law occurring at trial pursuant to Minnesota Rules of Civil Procedure, Rules 50 and 59.01 (f) for when the Court excludes all Plaintiff's expert rebuttal witnesses.

B. A judgment as a matter of law or a new trial should be granted the Plaintiff on the grounds of accident and surprise pursuant to Minnesota Rules of Civil Procedure, Rules 50 and 59.01(c) due to the nondisclosure of the testimony of Defendants' experts, Mark V. Larkins, M.D..

C. A judgment as a matter of law or a new trial should be granted the Plaintiff on the grounds of misconduct of defense counsel pursuant to Minnesota Rules of Civil Procedure, Rules 50 and 59.01(b) in that he failed to make proper disclosure of the testimonies of Mark V. Larkins, M.D.

D. A judgment as a matter of law or a new trial should be granted the Plaintiff on the grounds of error of law for the Court denying the Plaintiff's Motion to Compel the depositions of Plaintiff's treating physicians pursuant to Minnesota Rule of Civil Procedure, Rule 35.04.

E. A judgment as a matter of law or a new trial should be granted the Plaintiff on the grounds of error of law for the Court awarding attorney fees against the Plaintiff on the Plaintiff's Motion to Compel the depositions of the treating physicians.

F. A judgment as a matter of law or a new trial should be granted the Plaintiff on the grounds of error of law in the Court denying Plaintiff's Motion for Leave to take the depositions of the Defendants' retained experts.

G. A judgment as a matter of law or a new trial should be granted the Plaintiff on the grounds of error of law in the Court granting the Defendants' Motion in Limine prohibiting any argument, insinuation or reference that there was a violation of the Hippocratic Oath and/or that the Hippocratic Oath is the standard of care.

H. A judgment as a matter of law or a new trial should be granted the Plaintiff in that the Court committed error in denying the Plaintiff's Motion to Take the Depositions of the Defendants' Retained Experts in light of the nondisclosure of such experts and the Court's exclusion of rebuttal witnesses which makes the application of Minn. Stat. § 145.682 on the Plaintiff unconstitutional as the denial of equal protection and due process.

IDENTIFICATION OF ALL DOCUMENTS RELIED UPON

The Plaintiff identifies the following documents, including attachments, upon which this Motion for New Trial is based:

1. Complaint;

2. Defendant Stefan J. Konasiewicz, M.D. Answer to Plaintiff's Complaint;

3. Answer of Defendant St. Luke's Hospital of Duluth;

4. Plaintiff's Motion to Compel the Depositions of Plaintiff's Treating Medical Physicians and Leave to Take the Depositions of Defendants' Retained Experts;
5. Plaintiff's Slip Trial Brief Re: Defendants' Experts Disclosures;

6. Verdict of August 10, 2011;

7. Jury Instructions;

8. Affidavit of Richard E. Bosse of September 8, 2011;

9. Order and Memorandum filed June 20, 2011 in regards to Plaintiff's motion to compel the depositions of Plaintiff's treating physicians;

10. Order filed July 8, 2011 as to the Plaintiff's motion to take the depositions of Defendants' retained experts;

11. Daily transcript trial testimony of Defendants' experts, Dr. Larkins and Dr. Fleeson of August 5, 2011;

12. Defendant Stefan J. Konasiewicz, M.D.'s Disclosure of Expert Witnesses of February 1, 2011 of Dr. Mark V. Larkins;

13. Defendant Stefan J. Konasiewicz, M.D.'s Disclosure of William P. Fleeson, M.D., M.P.H.'s IME Report dated March 17, 2011 and served on May 6, 2011;

14. Affidavit of Robert A. Beatty, M.D., FACS, of September 7, 2011;

15. Affidavit of Clark C. Watts, M.D., of September 7, 2011;

16. Affidavit of Bruce A. Norback, M.D., of September 7, 2011; and

17. All pleadings and records in this file.

FACTS

A. STATEMENT OF FACTS.

On February 19, 2006 Mr. Meinershagen, a 74 year old male, self-presented (and was admitted) to St. Luke's Hospital of Duluth for left hand and arm weakness and numbness that had persisted for several days prior to admission, giving rise to concerns that he may have had a stroke. On the day of admission, Michael T. Semotuk, M.D., (not employed by the Defendant St. Luke's) performed a CT scan (without contrast) of Mr. Meinershagen's brain which revealed a posterior right frontal lesion (approximately 2.5 cm in size) suggesting the presence of a neoplastic lesion (tumor) or alternatively, an edema from a subacute cortical infarct (stroke). The following day, February 20, 2006, an MRI was performed. Radiologist Fredrick E. Ekberg, M.D., (not employed by the Defendant St. Luke's) provided an MRI reading to which he found an “Irregularly enhancing lesion in the high right hemispheric area” whose appearance was not typical for an infarct and thus neoplasm could not be excluded, though there was relatively little mass effect from the lesion. On February 21, 2006 Mr. Meinershagen was examined by Defendant Stefan J. Konasiewicz, M.D., for the first time. During that examination Dr. Konasiewicz recommended Mr. Meinershagen undergo a brain biopsy. That same day, Dr. Konasiewicz performed the surgical procedure of brain biopsy by drilling through Mr. Meinershagen's skull in the posterior right frontal region above the 2.5 cm lesion identified in the CT/MRI scans and removed two tissue samples. The tissue samples were submitted to pathology and were reported as benign on February 21, 2006.

As a result of the brain biopsy performed by Dr. Konasiewicz, Mr. Meinershagen developed intraparenchymal hemorrhage [3] within the area of the biopsied lesion, post-operative seizure, dense left hemiplegia [4], severe cerebral dysfunction and brain injury. Following the procedure, Mr. Meinershagen remained hospitalized until March 3, 2006 when he was discharged into St. Luke's in-patient rehabilitation department; where he required total assistance for his activities and daily living. On April 5, 2006 Mr. Meinershagen was discharged to a nursing home requiring assistance with daily living activities; with limitations including cognitive deficits, speech impairment and wheelchair bound. He was discharged to subacute rehab at Lakeshore Lutheran Nursing Home and finally discharged to Bayshore Health Center and remains to this day, continuing to require full-time assistance for his daily living activities. He continues to be wheelchair bound and has permanent cognitive deficits and speech impairments. The treatment path that lead Mr. Meinershagen into Dr. Konasiewicz's care began with Mr. Meinershagen walking into St. Luke's Hospital of Duluth under his own strength, with his only complaint that weakness and numbness in his left hand and arm, which was resolving and improving. Today, Mr. Meinershagen is virtually completely incapacitated. Dr. Konasiewicz's negligence is the direct and proximate cause of Mr. Meinershagen's incapacitated condition.

B. PROCEDURAL HISTORY.

This action was commenced by service of the Complaint dated February 13, 2010. The Defendant Stefan J. Konasiewicz, M.D., responded by Answer of March 8, 2010 and Defendant St. Luke's Hospital of Duluth responded by Answer of March 15, 2010.

The Plaintiff filed a Motion to Compel the Depositions of Plaintiff's Treating Medical Physicians and Leave to Take the Depositions of Defendants' Retained Experts on May 20, 2011. Argument was heard on June 6, 2011. The Order and Memorandum denying the motion to compel the depositions of Plaintiff's treating physicians was filed on June 20, 2011. An Order denying the motion to take the depositions of Defendants' retained experts, Dr. Mark V. Larkins and Dr. William P. Fleeson was filed on July 8, 2011.

The Defendants objected by a motion in limine to the rebuttal testimony of Dr. Bruce A. Norback as disclosed in his report of June 24, 2011 and served June 30, 2011 and Dr. Clark C. Watts as disclosed in the Plaintiff's Supplemental Answers to Defendants' Interrogatories served July 18, 2011. Defendants objected to the rebuttal testimony of these physicians on late disclosure. The Court entered an order at the close of the Defendants' case in chief precluding any rebuttal expert testimony.

C. VERDICT.

The jury determined this case on the standard of care. They answered the negligence question, “Was Defendant Stefan J. Konasiewicz, M.D., negligent in his care and treatment of Plaintiff Alan Meinershagen?” No!

D. DEPOSITIONS OF RETAINED EXPERTS.

Mark V. Larkins, M.D., and William P. Fleeson, M.D., are retained experts by the Defendant Dr. Konasiewicz for the purposes of testifying as to standard of care, causation, and a medical exam performed by Dr. Fleeson.

1. Mark V. Larkins, M.D.

Dr. Mark Larkins is the retained expert for standard of care and causation testimony for Defendant Dr. Konasiewicz. He has described as a basis for his opinion an unrecorded conversation between Dr. Konasiewicz and a radiologist. (See paragraph 12 of Dr. Larkins' disclosure attached to the Affidavit of Richard E. Bosse of September 8, 2011 as Exhibit E.):

> 12. Dr. Konasiewicz then spoke in person with the radiologist who read the MRI scan. I understand that during this conference, the reviewing radiologist indicated that he believed the mass was not consistent with a stroke and was most likely a tumor. With that assurance from the radiologist, Dr. Konasiewicz then spoke with Meinershagen about performing a biopsy of the mass in an effort to determine the nature of the lesion.

Furthermore, he has made statements in his disclosure as follows:
a. “I have also spoken to Dr. Konasiewicz about his care of Meinershagen” (Paragraph 4 of Exhibit E attached to the Affidavit of Richard E. Bosse of September 8, 2011);

b. “Given the information available at that time, it was reasonable and within the standard of care for a neurosurgeon in Dr. Konasiewicz's situation to proceed with a biopsy” (Paragraph 6 of Exhibit E attached to the Affidavit of Richard E. Bosse of September 8, 2011);

c. “The information available to Dr. Konasiewicz at the time, however, made it reasonable to him to suspect that the mass ... was a tumor.” (Paragraph 7 of Exhibit E attached to the Affidavit of Richard E. Bosse of September 8, 2011).

Nowhere does Dr. Larkins describe his discussions with Dr. Konasiewicz nor does he describe the information available to Dr. Konasiewicz at the time.
d. “Dr. Konasiewicz's records indicate that he discussed these findings ...” (Paragraph 13 of Exhibit E attached to the Affidavit of Richard E. Bosse of September 8, 2011).

And, nowhere does he describe where the records are or what information was available.

> e. Dr. Konasiewicz would face possible legal consequences and criticisms if he failed to act. (Paragraph 16 of Exhibit E attached to the Affidavit of Richard E. Bosse of September 8, 2011).

Dr. Larkins fails to describe what the legal consequences or criticisms are.

2. Dr. Fleeson.

Defendant Konasiewicz's medical examination by Dr. Fleeson was due to be disclosed on or before May 1,2011. On May 6, 2011, Plaintiff's counsel received a 26-page report of Dr. Fleeson dated March 17, 2011. It contains a number of discrepancies, inconsistencies and incompleteness. For brevities' sake, a few of these are as follows:
a. Dr. Fleeson in his Disclosure of May 6, 2011 attached to the Affidavit of Richard E. Bosse of September 8, 2011 as Exhibit F describes at page 5 that he reviewed the following medical record documentation for the purposes of his disclosure

1. a deposition [which he fails to describe];

2. miscellaneous non-medical records; and

3. “and perhaps a few other sources not specifically called out here.”

b. At page 5 he does not describe the medical records which he has reviewed, more specifically not detailing the medical records by date;

c. At page 13 he states “I reviewed a large number of handwritten pages, facility unidentified ...”.

d. At page 8 he states “the details of the study were discussed”. But does not discuss who had the discussions and what was discussed.

e. At page 15 he states “The details of the study were discussed...”. He fails to state in what record he has found this discussion and again whom was present and participated in the discussion.

f. On page 17 he states “03/09/06 was a Psychological Diagnostic Interview performed by Duluth Psychological Clinic, handwritten, no signature seen...” and undated.

g. At page 18 he discusses that the notes from Denfeld Clinic from June 2006 through 09/22/09 reflected that he “changed somewhat over time” but fails to describe the changes.

h. At page 22 that during his examination he gave the following tests:

1. “A mini mental status screening”;

2. “ ‘rugged rock’ sentence”; and

3. “ ‘glass houses' and ‘birds of a feather’ proverbs”.

None of these tests does he describe for the reader.

i. At page 23 he states “By date of mailing of this report no X-rays or imaging studies have arrived for my review.” From this statement it appears that the expert is going to comment at sometime on these films.

The Plaintiff moved to take the depositions of the Defendants' retained experts. The Court in an Order of July 8, 2011 denied the same.

E. DEPOSITIONS OF PLAINTIFF'S TREATING PHYSICIANS.

1. Dr. Ekberg and Dr. Semotuk.

Defense retained expert Mark V. Larkins, M.D., based his February 1, 2011 affidavit in significant part on the account that:

> 12. Dr. Konasiewicz then spoke in person with the radiologist who read the MRI scan. I understand that during this conference, the reviewing radiologist indicated that he believed the mass was not consistent with a stroke and was most likely a tumor. With that assurance from the radiologist, Dr. Konasiewicz then spoke with Meinershagen about performing a biopsy of the mass in an effort to determine the nature of the lesion.

There is no record of this conference or discussion in the medical records.

In response to Dr. Larkins' affidavit Plaintiff's counsel Richard E. Bosse contacted Dr. Ekberg, the MRI radiologist, whom is not an employee of the Defendant St. Luke's. In a March 30, 2011 phone conversation between Dr. Ekberg and Mr. Bosse, Dr. Ekberg stated that he had no recall of ever meeting or talking with Dr. Konasiewicz. Further Dr. Ekberg stated that he did not say (and would not have said) that Mr. Meinershagen's brain mass was most likely a tumor. Dr. Ekberg stated to Mr. Bosse that it was his opinion in 2006 and it is his opinion now that the MRI/CT scans of Mr. Meinershagen's brain mass presented a situation that was basically a “toss up” between a stroke (infarct) and a tumor. Plaintiff's counsel then prepared an affidavit for Dr. Ekberg reflecting his aforementioned statements on the matter. Plaintiff's counsel's office also contacted Dr. Semotuk, whom also was not an employee of the Defendant St. Luke's, for the purpose of discussions leading to a similar affidavit.

When Dr. Ekberg did not return the affidavit timely, Plaintiff's counsel subpoenaed both Dr. Ekberg and Dr. Semotuk for depositions on May 2, 2011. On April 15, 2011 counsel for Plaintiff received correspondence from attorney Cecilie M. Loidolt indicating that she would be representing Dr. Ekberg and Dr. Semotuk and that she would not produce Dr. Ekberg and/or Dr. Semotuk for deposition absent a court order requiring her to do so but indicated she would cooperate in producing them for an informal conference. She cited to Minn. R. Civ. P. 35.04.

The Plaintiff moved to compel the depositions of the treating radiologists, Dr. Ekberg and Dr. Semotuk, who are located at the Defendant's place of business, St. Luke's Hospital. On June 20, 2011 the Court denied the motion to compel.

2. Dr. Knuths and Dr. Peterson.

Gary M. Peterson, M.D., an employee of the Defendant St. Luke's, treated Mr. Meinershagen from January 2003 through October 2009 as a family practitioner. Jay R. Knuths, M.D., also an employee of the Defendant St. Luke's, together with his resident, Christopher Baumbach, provided care for Mr. Meinershagen upon his admission to St. Luke's in September of 2010. Mr. Meinershagen was admitted to St. Luke's on September 17, 2010 and discharged on September 23, 2010. Mr. Meinershagen was admitted for concerns regarding his right great toe and second toe developing cellulitis and becoming swollen. Patient was treated with vancomycin and Zosyn for IV antibiotic therapy. A consultation was made by Dr. Knuths with orthopedics to consider medical management/ amputation of the toe due to likely osteomyelitis. Orthopedics decided to do watchful waiting at that time. Patient was discharged to Bayshore Nursing Home.

On April 11, 2011 Plaintiff served Notice upon Dr. Peterson and Dr. Knuths of Plaintiff's intent to depose said doctors. On April 18, 2011 the Plaintiff received notice dated April 14, 2011 that Mr. Bateman, Defendant St. Luke's counsel, would be representing Dr. Peterson and Dr. Knuths. Mr. Bateman indicated that he would not produce Dr. Knuths or Dr. Peterson for deposition absent a court order requiring him to do so but indicated that he would cooperate in producing them for an informal conference. He cited to Minn. R. Civ. P. 35.04.

The Plaintiff moved to compel the depositions of Dr. Peterson and Dr. Knuths by Order of June 20, 2011 the Court denied the motion. Dr. Peterson later testified at trial on behalf of the Defendants.

F. NON-DISCLOSURE OF DR. LARKINS.

i. Affidavit of Mark V. Larkins, M.D.

Dr. Mark V. Larkins is the retained expert of the Defendants who testified as to the standard of care and causation. He disclosed in his affidavit of February 1, 2011 the following opinions:
6. Dr. Konasiewicz acted reasonably and well within the standard of care when he treated Meinershagen. Dr. Konasiewicz appropriately evaluated Meinershagen, his medical history, and the CT and MRI scans of February 19 and 20, 2006. Given the information available at that time, it was reasonable and within the standard of care for a neurosurgeon in Dr. Konasiewicz's situation to proceed with a biopsy of the mass observed in Meinershagen's brain.

9. A non-contrast CT brain scan was conducted on February 19, 2006, which identified a lesion in the right front-parietal area suggestive of a neoplasm. Dr. Konasiewicz was consulted because the nature of the lesion was characteristic of a tumor.

10. An MRI scan of the brain was obtained on February 20, 2006.

11. The report of the MRI scan showed an irregular enhancing lesion in the high right hemispheric area. The reviewing radiologist noted that this appearance was not typical for an infarct, and therefore, neoplasm was not excluded. In other words, the MRI scan indicated that the mass did not have the characteristics suggestive of a stroke.

12. Dr. Konasiewicz then spoke in person with the radiologist who read the MRI scan. I understand that during this conference, the reviewing radiologist indicated that he believed the mass was not consistent with a stroke and was most likely a tumor. With that assurance from the radiologist, Dr. Konasiewicz then spoke with Meinershagen about performing a biopsy of the mass in an effort to determine the nature of the lesion.

13. Dr. Konasiewicz's records indicate that he discussed these findings with Meinershagen, explained the risks to the patient, and explained the reason for proceeding with a biopsy of the brain lesion. Meinershagen then consented to the procedure and its risks, which included bleeding.

15. Dr. Konasiewicz acted reasonably and within the standard of care in light of the information available to him at the time he treated Meinershagen. Carrying out a biopsy to determine the nature of the tumor and whether it was malignant was reasonable and within the standard of care.

See the Affidavit of Mark V. Larkins, M.D., attached to the Affidavit of Richard E. Bosse of September 8, 2011 as Exhibit E.

ii. Testimony at Trial of Dr. Larkins Outside His Affidavit.

Dr. Larkins testified at trial to the following, outside his expert disclosure: (See the daily transcript of August 5, 2011 attached to the Affidavit of Richard E. Bosse of September 8, 2011 as Exhibit J)

9. CT Scan

a. Edema. At page 22 and 23 Dr. Larkins testified that adjacent edema is consistent with neoplasm.
b. Hyper density. Dr. Larkins testified at pages 23 and 24 that CT scan reflected density within the lesion which was significant for a mass lesion (tumor).

c. Interpretation of tumor. Dr. Larkins testified at trial that CT scan was interpretive of a tumor.

10. MRI Scan

a. Irregularly Enhancing Lesion. At pages 27 and 28 Dr. Larkins testified Dr. Ekberg's impression of the irregularly enhancing lesion is an appearance that is not typical for an infarct (stroke).
b. Mass Effect. At page 28 Dr. Larkins agrees that a mass effect is the indicator for a tumor. He testifies, at page 28, that there is no gross mass effect with a midline shift i.e. the midline structure of the brain. It is his opinion that he is pushing around things locally which is also a mass effect. He testifies that the neurosurgeon's eye is different than a radiologist.

c. T2 Flair Axial. At pages 31 and 32 Dr. Larkins spends considerable time discussing the T2 flair axial which he testifies reflects a spheroid (ball) which is certain for a tumor because a stroke would be wedge-shaped to the surface of the brain.

d. Neurosurgeon's Prospective. Dr. Larkins testified at pages 34 and 35 that “Neurosurgeon's prospective” when you look at the different cuts it “really gives you this idea there is something expansial (phonetic) that expanding the normal structures that, in effect, is mass effect and that he has seen tumors that are this size and don't have mass effect

11. Symptoms

a. Sudden Onset. Dr. Larkins testifies at page 19 that the sudden onset is indicative of a tumor.
b. Improving Symptoms. Dr. Larkins testifies at page 20 and 21 that the improving symptoms is not indicative of a stroke because Mr. Meinershagen was “tuned up” while in the hospital for three days.

12. Fast Growing Lesion and aggressive tumors. At pages 47 and 48 Dr. Larkins testifies that if this is a tumor it could be a fast growing lesion with a doubling time and that if one waited and waited to perform scans that it could become life threatening (at page 52) if it is an aggressive tumor. He testified at page 47 that these “aggressive tumors” can grow he states (line 23):

“I've had people with just within a week, ten days where - the doubling time of some of the aggressive tumors is fantastic, I mean, it can be in days ...”.

13. Rush to Biopsy. Dr. Larkins testified that because of the availability of the operating time and space was reasonable to perform the surgery on the same day.

17. Speaking to Patient. Dr. Larkins testifies at pages 46 and 47 that Dr. Konasiewicz is speaking with the patient about the probably that there is a brain tumor was proper and reasonable.

iii. Admissions at Trial of Dr. Larkins of his Nondisclosure.

Dr. Larkins admitted on the stand, in cross-examination, that he had not disclosed grounds for his opinion as follows:
1. At pages 70 and 71 he testified that he did not comment in regards to improving symptoms

Page 70

Q ... Um, you had seen, had you not, in Dr. Beatty's Affidavit that he had discussed the, um, improving symptoms as being an indicator that this was more likely a stroke than a tumor?

A I saw that.

Q Okay. Um, I didn't see where you had any comment about that in your Affidavit. Do you recall having made a comment in your Affidavit to that effect?

A I don't think I did.

Page 71

A ... I think it's an important fact, ...

2. At page 78 he testified he did not give a detailed response to the specific facts relied upon by Dr. Beatty as grounds for his opinion.

Page 78

Q -- in Dr. Beatty's Affidavit? Okay. And you would agree with me that you specifically did not make any detailed response in regards to these specific facts upon which he was relying on grounds to make his opinions, is that correct

A That's correct.

3. At page 82, he admitted he had made no comment in regards to the sulci, to which he testified at trial.

Page 82

Q In your Affidavit you didn't comment in regards to the testimony you just gave us in regard to sulci, did you?

A No, not specifically.

4. At pages 85 and 86 he admits he did not put forth in writing specific facts on the appearance of the lesion on the MRI, which was the primary topic of his direct examination and the grounds which supplied his belief that this is a cancerous lesion.

Page 85

A Well, you know, I don't specifically talk about every detail of the MRI ...

Q You didn't - what details did you go through?

A Well, I didn't put them in writing, but the details that I think of when I analyze a case like this are the ones I just told you.

Q So you didn't put the details in writing that, um - these details aren't in your report that you've testified to in formulating your opinion for today's testimony, is that correct?

Page 86

A Well, they are in that I agree with Dr. Konasiewicz with - with the decision making that this was a mass lesion based on those criteria. You know, I didn't specifically lay those out.

Q You didn't lay out those grounds to which you came to the conclusion --

A Right.

At this point, in a sidebar, the Court prohibited counsel from asking further questions as to his nondisclosure.

G. DEFENDANTS' MOTION TO EXCLUDE PLAINTIFF'S REBUTTAL EXPERTS.

1. Clark C. Watts, M.D.

Dr. Clark Watts is a neurosurgeon who has been listed on the trial witness list of July 13, 2011 as a retained rebuttal expert. (See Plaintiff's Witness List attached to the Affidavit of Richard E. Bosse of September 8, 2011 as Exhibit G.) He was being called as a rebuttal witness to rebut the testimony of the Defendants' retained medical expert Dr. Mark Larkins, a neurosurgeon.

The Plaintiff's counsel was advised in mid-June, 2011 by Dr. Beatty, the Plaintiff's neurosurgeon for the case in chief, that he would be unavailable for rebuttal the second week of trial. (See Affidavit of Robert A. Beatty, M.D., of July 27, 2011 attached to the Affidavit of Richard E. Bosse of September 8, 2011 as Exhibit I.) On June 28, 2011 the Plaintiff's counsel located Dr. Clark Watts and sent him medical records, depositions, and affidavits on that date for his review. Dr. Watts advised by telephone call on July 4, 2011 that he was available to testify in rebuttal in the second week of trial and his findings and opinions agreed with Dr. Beatty. (See Plaintiff's Supplemental Answers to Defendants' Interrogatories of July 18, 2011 attached to the Affidavit of Richard E. Bosse of September 8, 2011 as Exhibit H.)

The Defendants' counsels were notified on July 13, 2011 of Dr. Watts, a neurosurgeon, being a retained rebuttal expert on the trial witness list.

2. Bruce A. Norback, M.D.

Dr. Norback is a neurologist who is being called specifically for rebuttal to the Defendants' IME expert, Dr. Fleeson.

Pursuant to the Second Amended Scheduling Order filed November 4, 2010 in this cause of action the Defendants had prior to May 1, 2011 to perform and have served upon Plaintiff a medical exam of the Plaintiff. Dr. Fleeson performed the medical exam on March 17, 2011 and issued a report dated March 17, 2011 which was not served until May 6, 2011, after the deadline. (See Dr. Fleeson's report of March 17, 2011 attached to the Affidavit of Richard E. Bosse of September 8, 2011 as Exhibit F.)

After receiving and reviewing Dr. Fleeson's report on May 6, 2011 realizing that the Defendants had raised new issues not disclosed either in their answer or the affidavit of Dr. Larkins, primarily that Alan Meinershagen was going to become wheelchair bound anyway as a result of his diabetes causing peripheral vascular disease and that such was the result of him not taking care of himself medically, Plaintiff's counsel started searching for an expert to perform a medical exam of the Plaintiff, particularly a neurologist in that Mr. Meinershagen's injuries from the biopsy are the result of neurologically based brain damage. The Plaintiff's counsel search for such a neurologist was made difficult by “the conspiracy of silence” that Minnesota doctors will not testify against other Minnesota doctors and that Mr. Meinershagen is unable to travel. Plaintiff's counsel has utilized that services of a neurologist who has examined plaintiff's before in a medical malpractice litigation and such neurologist was in Chicago, Illinois. Plaintiff's counsel's office was being advised by the nursing home that Mr. Meinershagen would be unable to travel.

On May 19, 2011 Plaintiff's counsel located and consulted with Dr. Norback, a Minneapolis neurologist, who agreed to perform the medical exam in Duluth and was available to do the same on June 23, 2011.

Dr. Norback performed that medical exam on June 23, 2011 and issued his report to Plaintiff's counsel, which was received on June 28, 2011.

Defendants were served with a copy of that report and Dr. Norback's curriculum vitae on June 30, 2011.

The Defendants moved in limine to exclude the testimony of these rebuttal experts on the grounds of late disclosure. The Court reserved ruling until the close of the Defendants' case, at which time an oral order was entered granting the same. No written order or memorandum has been issued.

H. PLAINTIFF'S REBUTTAL TESTIMONY.

1. Clark C. Watts, M.D.

Dr. Clark C. Watts would have rebutted each and every one of the new, undisclosed issues, described above of Dr. Larkins and those disclosed. He would have testified as follows:
1. Your Affiant is Clark C. Watts, M.D., who expected to testify in rebuttal with respect to issues of negligence, malpractice and causation.

2. Your Affiant, Clark C. Watts, M.D., is a licensed physician who is board certified by the American Board of Neurological Surgeons and who's C.V. was served on July 13, 2011, who is retired from the operative practice of Neurosurgery and has closed his supportive office practice. He nevertheless maintains an office in Austin Texas for selective consultation.

3. Your Affiant, Clark C. Watts, M.D., has testified in medical malpractice cases since 1977, on behalf of both physicians/ defendants and the patient/plaintiff, based upon the merits of the case. Your affiant has also been a consultant for medical malpractice carriers for physicians. He is also a Brigadier General in the United States Army and has been an examiner for the American Board for Neurological Surgeons.

4. I was prepared to testify in rebuttal in the trial of the above-entitled matter and was in Stillwater, Minnesota the afternoon of Tuesday, August 9, 2011 prepared to testify the next day, the final day of trial.

5. I agree wholeheartedly with the Second Amended and Supplemental Affidavit and Identification of Expert Robert A. Beatty, M.D., F.A.C.S., Pursuant to Motion to Dismiss of July 1, 2011.

6. I agree wholeheartedly with the Affidavit of Expert Robert A. Beatty, M.D., F.A.C.S., of September 7, 2011 and the Affidavit of Expert Bruce A. Norback, M.D., of September 7, 2011.

7. I have reviewed the following:

a. Medical Records from Bayshore;

b. Medical Records from Denfield Medical Clinic - St. Luke's;

c. Medical Records from St. Luke's Pavilion Surgical Associates;

d. Medical Records from Duluth Clinic; and

e. Medical Records from St. Luke's Physical Medicine & Rehab.

All identified by bate-stamp DB 1 - DB 838.

f. Affidavit and Identification of Expert Robert A. Beatty, M.D., F.A.C.S., served 08/11/10

g. Affidavit and Identification of Expert Richard A. Rubenstein, M.D., served on 8/11/10;

h. Donna Brenna, R.N.'s notes from Alan Meinershagen's IME;

i. Affidavit of Mark V. Larkins, M.D., served February 1, 2011;

j. IME report of William P. Fleeson, M.D., served May 6, 2011;

k. Oral Deposition of the Defendant Stefan J. Konasiewicz, M.D., of April 19, 2011;

l. Report of Dr. Norback;

m. Amended and Supplemental Affidavit and Identification of Expert Robert A. Beatty, M.D., F.A.C.S., Pursuant to Motion to Dismiss served on June 22, 2011;

n. Mark Larkins's updated CV;

o. IME of Dr. Norback;

p. Corrections to Oral Deposition of Dr. Konasiewicz;

q. Second Amended and Supplemental Affidavit and Identification of Expert Robert A. Beatty, M.D., F.A.C.S., Pursuant to Motion to Dismiss; and

r. Health Care Cost Evaluation of Linda Graham;

s. Affidavit of Robert A. Beatty, M.D., F.A.C.S., dated September 7, 2011;

t. Affidavit of Bruce A. Norback, M.D., dated September 7, 2011;

u. Daily transcripts from the trial testimony of Mark Larkins, M.D. to which page numbers are referred.

8. I would have rebutted and testified as follows;

9. CT Scan:

a. Edema. At page 22 and 23 Dr. Larkins testified that adjacent edema is consistent with neoplasm. I would have been able to testify in rebuttal that any acute injury to the brain is going to produce edema, as is the case at hand with this known infarct.

b. Hyper density. Dr. Larkins testified at pages 23 and 24 that CT scan reflected density within the lesion which was significant for a mass lesion. This is true for generally all lesions, including an infarct, which is the case at hand.

c. Interpretation of tumor. Dr. Larkins testified at trial that CT scan was interpretive of a tumor. The unenhanced head CT has little value of specificity in the diagnosis of either cerebral vascular disease or slow growing neoplasms. Dr. Semotuk, the radiologist, writes in his report of the head CT scan: “MRI would likely allow much improved characterization of these lesions.” Diagnosis follows characterization and he is in effect deferring to a MRI. CT scan are of little or no value in this case, except to show that there is a lesion.

d. Misstating the evidence. Dr. Larkins's use of the CT to arrive at a diagnosis of tumor is badly misstating the evidence, misleading the jury, and poorly serves the court. He provides no basis for ignoring the statement in the impression deferring to the MRI. Most of his direct is devoted to these errors.

10. MRI Scan:

a. Irregularly Enhancing Lesion. At pages 27 and 28 Dr. Larkins testified Dr. Ekberg's impression of the irregularly enhancing lesion is an appearance that is not typical for an infarct. But virtually all lesions in the brain enhance irregularly. Dr. Ekberg, in his report, is clearly stating that this lesion is likely an infarct but that neoplasm cannot be excluded. A significant way to make the determination between a tumor and an infarct is to look for mass effect.
b. Mass Effect. At page 28 Dr. Larkins agrees that a mass effect is the indicator for a tumor. He testifies, at page 28, that there is no gross mass effect with a midline shift i.e. the midline structure of the brain. It is his opinion that he is pushing around things locally which is also a mass effect. He testifies that the neurosurgeon's eye is different than a radiologist. This makes no sense. All we have to do is look at the sulci, the creases in the brain, in the area of the lesion. There is no evidence of mass effect which could give rise to kinking of sulci. The neoplasm, or new tissue, pushes aside the original existing tissue and causes the displacement. There is no displacement in the sulci.

c. T2 Flair Axial. At pages 31 and 32 Dr. Larkins spends considerable time discussing the T2 flair axial which he testifies reflects a spheroid (ball) which is certain for a tumor because a stroke would be wedge-shaped to the surface of the brain. Dr. Larkins is incorrect in his reading of this particular scan. A stroke on many scans, depending upon the angle of the head, will appear as wedge-shaped. A stroke is really cone-shaped and 3 dimension but appears on these many scans as wedge-shaped. On this particular scan we are looking at the center part of the cone which appears to be a ball. The majority of the scans reflect the stroke to be wedge-shaped in the two dimensions, not a ball. In my opinion, this was a blatant misleading of the jury and the court in regards to the interpretation of this scan. Dr. Ekberg did not make such determination and we know it was not a tumor spheroid but an infarct.

d. Neurosurgeon's Prospective. Dr. Larkins testified at pages 34 and 35 that “Neurosurgeon's prospective” when you look at the different cuts it “really gives you this idea there is something expansial (phonetic) that expanding the normal structures that, in effect, is mass effect” and that he has seen tumors that are this size and don't have mass effect. I would have been able to testify that in my over 40 years of neurosurgery I have rarely seen a tumor this size which did not produce mass effect locally with distortion of the sulci globally with the midline shift. I would have been able to show this mass effect by showing the scans of the March 17th MRI. These scans show hemorrhage as a mass lesion. This lesion has a hematoma in it. It is almost identical in size to the stroke. It has created mass effect. It has obliterated all of the sulci around it. This is particularly seen in the lateral view. It has also created a midline shift. It is the perfect example of the scans which contradicted entirely Dr. Larkins's testimony that these scans inconclusively indicate a tumor. There is not one characteristic of a tumor present on any of these scans.

e. Radiologist report and interpretation. Dr. Larkins testifies at length with views of various scans that his iSnterpretation of the CT scan is that it is neoplasm. Appearance on the MRI scan are not typical for an infarct, therefore neoplasm is not excluded as Dr. Ekberg states. This is a way of saying that since not all the elements are present for the typical vascular lesion, in order to complete the differential diagnosis, we cannot exclude neoplasm. It does not say we must consider neoplasm because of the existence of significant characteristics. In fact the only element characteristic for neoplasm, mass lesion, he specifically negates. And note the Clinical Information Dr. Ekberg is working from when he writes his report: “The patient is a 74-year-old man *with stroke symptoms.”*

11. Symptoms

a. Sudden Onset. Dr. Larkins testifies at page 19 that the sudden onset is indicative of a tumor. This is an absolute fabrication. Generally sudden onset is clearly a symptom of a stroke. A tumor, more likely than not, is going to produce symptoms such as increased headaches, loss of vision, progressive clumsiness then weakness and decreased perceptibility of sensation because the tumor is growing and is not a sudden lesion which occurs in the brain due to a vascular incident.

b. Improving Symptoms. Dr. Larkins testifies at page 20 and 21 that the improving symptoms is not indicative of a stroke because Mr. Meinershagen was “tuned up” while in the hospital for three days. He overlooks the fact that the symptoms improved for the four days before he got to the hospital. This is recorded in the history by several doctors. Again, this is Dr. Larkins blatantly misleading the court and the jury.

12. Fast Growing Lesion and aggressive tumors. At pages 47 and 48 Dr. Larkins testifies that if this is a tumor it could be a fast growing lesion with a doubling time and that if one waited and waited to perform scans that it could become life threatening (at page 52) if it is an aggressive tumor. Dr. Larkins is playing the court and the jury for a fool with his testimony. There is no basis for such a statement that brain tumors grow that rapidly. He also most grievously misstates the science of brain tumors when on p 47 of his testimony, in discussing how fast “these aggressive tumors” can grow he states (line 23): “I've had people with just within a week, ten days where - the doubling time of some of the aggressive tumors is fantastic, I mean, it can be in days ...”. So through his testimony he established that the lesion in this case is an aggressive tumor, but also these tumors can take over with any delay of diagnosis and treatment. This is nonsense. An aggressive tumor on MRI will not be this anatomically passive. There will be unsettling irregularities to its margins. There will be evidence of necrosis and of neovascularization. There will be evidence of mass effect.

13. Rush to Biopsy. But all this is relatively secondary to the question of why the rush to biopsy, besides the availability of operating time and space. In summary the timing of the biopsy seems to be based upon the principle that there was no good reason to delay. This position displays an ignorance of basic principles of the management of ill patients. The most basic principle is that one: First do no harm. This is practiced in the real world by the adoption of the following guidance: use a treatment plan that calls for maximum benefit for the patient at minimal risk. In this are contained calculations regarding ease of application of the plan to include availability of repeated neurological evaluations and their accuracy, and their support by readily available imaging.

14. Algorithm. An algorithm is “A formula or set of rules for solving a particular problem. In health care, a set of steps used in diagnosing and treating a disease. Appropriate use of algorithms in medicine may lead to more efficient and accurate patient care as well as reasonable costs. *Taber's Cyclopedic Medical Dictionary* 76 (21st ed. 2009). From this analysis comes the options. The first is to biopsy. This is invasive, can result in hemorrhage, infection, and in failure to diagnose. The second option is one of watchful waiting. This is more intensive in that it requires constant attention to the course the patient's condition may take. It requires repeated noninvasive imaging. And it requires the physician communicate regularly and well with the patient.

15. With either of these alternatives this approach will eventually lead to the diagnosis. Most important with this option is the quality of the surveillance of the patient. This would have led to the diagnosis of a vascular cause for the patient's symptoms without need of the invasive procedure which resulted in his severe worsening.

16. The differences between the two options as they relate to benefit/risk analysis is so great as to make it negligent to offer the first option of biopsy. The option of watchful waiting will lead to the diagnosis without risk to the patient. Biopsy may lead to what happened to this patient.

17. Speaking to Patient. Dr. Larkins testifies at pages 46 and 47 that Dr. Konasiewicz in speaking with the patient about the probability that there is a brain tumor was proper and reasonable. As stated above, such is a total misread of the scans and discussions with the radiologist which certainly did not occur. He also discusses that this was not a deep-seeded tumor and thus you did not have to converse high priced real estate and therefore the risks was considerably less. All areas of the brain are high priced real estate as was evidenced by this particular case.

18. Consent of Patient. Dr. Larkins testified at page 40 that Dr. Konasieiwcz had “...explained the procedure to the patient as well as the risk” and at page 42 that the offer of a brain biopsy to Mr. Meinershagen was “perfectly reasonably” and “absolutely” within the standard of care and that the risk of a hemorrhage was “34%” at page 49. I would have testified that to ask a patient to undergo the risk of this procedure including a hemorrhage which could lead to paralysis in the face of waiting several days, when it will appear is negligent. No reasonable neurosurgeon would recommend the procedure in such a situation under similar circumstances. Obtaining consent to perform a procedure which is not reasonable, negligent and below the standard of care, does not relieve the physician in the care he owes his patient. It was negligent and below the standard of care to obtain such consent. Mr. Meinershagen should not have been subjected to these risks.

19. Inability to Provide Rebuttal. Dr. Larkins's position in this case, his biases, led to testimony that was so irregular, so without scientific foundation, so out of the mainstream of neurosurgical science and experience as to be nothing short of embarrassing. The inability of the plaintiff to provide rebuttal testimony led to my opinion to a failure of the plaintiff to have his day in court.

20. Board Exam. I have been an examiner for the American Board of Neurological Surgeons in which I have had to evaluate the responses and answers to questions given the applicants for board certification. In my opinion, if such responses had been given by an applicant as contained in Dr. Larkin's testimony and as reflected therein, his responses and testimony would not have passed.

See the Affidavit of Clark C. Watts, M.D. of September 7, 2011 attached to the Affidavit of Richard E. Bosse of September 8, 2011 as Exhibit L.

2. Robert A. Beatty, M.D., F.A.C.S.

Dr. Robert A. Beatty, if he would have been available and able to testify in rebuttal, would have testified as follows:
1. Your Affiant is Robert A. Beatty, M.D., F.A.C.S., who is expecting to testify with respect to the issues of negligence, malpractice and causation.

2. Your Affiant, Robert A. Beatty, M.D., F.A.C.S., is a licensed physician who is board certified by the American Board of Neurological Surgery an is a Diplomate of this Board and who practices in Hinsdale, Illinois. See my Curriculum Vitae served on August 11, 2010.

3. I testified at trial on this matter before the jury on August 3, 2011, though I was unavailable for the second week of trial.

4. I am in complete agreement with the comments and opinions expressed by Dr. Clark C. Watts in his affidavit of September 7, 2011, and Dr. Bruce A. Norback in his affidavit of September 7, 2011.

5. I have reviewed Dr. Larkins' and Dr. Fleeson's testimony at trial and have noted a number of areas and opinions to which I could have offered rebuttal. First, in reviewing Dr. Larkins' testimony I am breaking this down into two sections. First, the failure to diagnose and the deviations of care there and number two, the failure to provide safe treatment and the deviations of care in this category. I refer to the page numbers from the daily transcript.

DR. LARKINS

Failure to diagnose

6. On page 17 Dr. Larkins minimized the key importance of history of an ischemic attack, especially the abrupt onset and the evidence of recovery. He attempted to confuse the issue by stating that tumors sometimes present this way. He indicated that evidence of an old CVA is not particularly relevant on page 23. Later on he agreed that acute onset was more likely with a CVA instead of a tumor on page 79. It is a rather evasive answer. It is counter to the standard of knowledge regarding CVA's as contained in the medical literature on the subject.
7. The risk factors are well known and are diabetes, evidence of vascular disease in other parts of the body, previous history of stroke, hypertension, elevated cholesterol and age, which was not mentioned at trial. The peak age of malignant tumor is at least one decade younger than in CVA.1

8. Nowhere in the literature is there mention of these risk factors with tumors. The sudden onset and recovery of symptoms is classic for ischemic attack or stroke. Dr. Larkins had felt that the history of an old CVA was not particularly relevant on page 23. This is absolutely untrue as reflected in the literature and is bothersome from the standpoint of intellectual honesty.

9. I believe that Dr. Larkins did not address the deviation from the standard of care not to do further testing in this patient in whom the diagnosis at least by x-ray, was unclear. The long testimony regarding CT and MRI scans, diffusion and flair scans and the conclusions by the radiologists only emphasize that the diagnosis by x-ray was unclear. This would require, to meet the standard of care, to do further testing involving serial CT and MRI scans and cerebral angiography to identify abnormal feeding vessels into a tumor or occluded vessels in a stroke. Dr. Larkins agreed that the diagnosis was unclear on page 30 and indeterminate on page 84.

10. There was a failure to identify that the lesion was not life threatening even though there was minimal mass effect, page 35. Dr. Larkins attempted to present that on page 113 this lesion could double in size in a short period of time in ten days, which is incorrect. The medical literature states that even the most malignant brain tumor doubling time is four weeks and is uncommon. The conservative approach to this case, that is serial CT and MRI scans, would have served two purposes, one of which was to determine if the lesion resolved or became smaller indicating a CVA or enlarged, which might suggest a tumor. This could have been determined in two weeks. There was testimony that tumors can present in an abrupt fashion and have a waxing and waning course. This is possible but not probable and most reasonable neurosurgeons would diagnose a CVA in the face of abrupt onset, which is key. The improvement would be further evidence of a CVA, contrary to Dr. Larkins' testimony. Tumors most commonly have a steady, relentless course as they enlarge.

Failure to provide safe treatment

11. The second main category of deviations from the standard of care was the failure to provide safe treatment. The maxim that all medical students are taught is “first, do no harm”. Dr. Larkins did admit on page 113 that most tumors are not fast growing. This indicates that there was no urgency to do the surgery on Mr. Meinershagen within five hours of admission. Again, “first, do no harm”.
12. Secondly, Dr. Larkins testified that biopsy of the brain has a three to four percent incidence of bleeding. He was unable to state what the percentage would be in an infarcted brain and there probably is no literature regarding this since it is seldom done, only if there is an error in diagnosis made, but he glossed over the fact that infarcted brain has injured and fragile blood vessels which are vulnerable to mechanical injury using a biopsy needle, thus it would be much greater than the 4% risk of bleeding for a tumor.

13. There is a substantial volume of literature regarding the breakdown of the blood-brain barrier, that is, alterations in the blood vessel wall in ischemia. [2] Dr. Larkins was deceptive in his answer in the sense that he should know this fact and withheld such information from the jury. Reasonable neurosurgeons recognize that ischemic brain tissue is more vulnerable to mechanical manipulation with a biopsy needle. On page 52 Dr. Larkins stated that it was reasonable to biopsy the brain in view of all of the vascular risk factors, which is not true.

14. Dr. Larkins could not show documentation in the chart that urgency was needed and the reasons for the urgent surgery. He did acknowledge on page 52 that the patient was not at risk of imminent death. There was no discussion in his testimony regarding documentation that alternative approaches could be tried, and what they were, a deviation from the standard of care.
15. It is apparent from the records that there was no discussion with Mr. Meinershagen that a stroke was a possibility and that alternative approaches could be tried. Dr. Larkins' testimony on page 53 about other reasons for the emergency surgery is particularly bothersome, namely the inability to get operating time, the fact that the patient was already fasting so that surgery could proceed quickly and that the surgery was done to treat the patient's anxiety that he had an unknown lesion inside his brain. These are specious. Any reasonable neurosurgeon would not consider these as valid reasons for operating on a patient in whom the diagnosis is almost certainly a vascular lesion and not a tumor. All of these reasons pale as valid reasons for doing emergency surgery in the face of an incomplete workup.

16. The risks of invasive surgery are greater in a lesion not adequately worked up. On page 100 he agreed that the biopsy of an infarct is below the standard of care if the diagnosis of an infarct is clear-cut. A reasonable neurosurgeon would require further workup to confirm or deny the diagnosis of an infarct before going ahead with the risk of surgery. Again on page 101 he is deceptive and evasive in his answer that it is not below the standard of care to biopsy an infarct because you should not need to biopsy an infarct. This is an evasive answer and is misleading to a jury of laypeople by suggesting that a biopsy of an infarct is not below the standard of care and then elaborates his answer with an unrelated fact. Again he ignored the fact that vessels are well-known to be more vulnerable to bleed after an infarct, as mentioned above.

17. On page 116 he stated that following a patient with serial CT and MRI scans is not safe and is irrelevant in this case. Reasonable neurosurgeons consider the standard of care to follow a patient with serial CT and MRI scans when the patient is not in a situation of imminent neurologic deterioration, a fact to which Dr. Larkins had already agreed.

18. The bottom line of all of this above discussion of Dr. Larkins' testimony is what would a reasonable neurosurgeon do in the face of a non-threatening lesion of the brain of indeterminate cause but most likely a stroke. The answer to that is obvious. At a minimum it would require further diagnostic testing.

DR. FLEESON

19. He agreed that he was presented to determine if the patient should have been living alone at the time of the February 2006 biopsy. In this case the timeline of medical decision making of whether or not to do a biopsy began at the time of the initial left-sided weakness four days before the patient appeared at the hospital. There is no relation to any of the extensive medical history that was testified to in that decision making. The only facts elucidated by Dr. Fleeson were that the patient had a history of vascular disease, hypertension, diabetes, elevated cholesterol, heart disease, obesity, old age, etc., that are all known risk factors for CVA.

20. All of his testimony is about an **elderly** man, living alone, not wanting medical care but requiring it because of general health problems. The patient was known to be non-compliant and adverse to medical care. I would agree that the testimony indicates that Mr. Meinershagen is an example of self **elder abuse** but it is not germane to the diagnosis and treatment of the brain lesion and to my way of thinking this testimony was an elaborate red herring leading the jury away from the events on the timeline, from the initial symptoms to the disastrous brain biopsy. It was deceptive to the jury to bring this evidence into play and was confusing them from looking at this issue with a clear mind.

21. On page 34 Dr. Fleeson noted that the patient was a ticking time bomb for some kind of vascular incident, indicating to me that he agreed that the patient was at a high risk for a CVA. His testimony on page 62 that Mr. Meinershagen was in a progression of unavoidable medical decline is true but not comparable to the much greater global insult he received as a result of Dr. Konasiewicz's violation of the standard of care in his treatment of the patient. He stated also on page 162 that the patient had peripheral vascular disease, including the head. He noted that on page 165 that stroke is the number 3 cause of death in the United States, after heart disease and cancer. He was not permitted to answer where in the list of causes of death do brain tumors lie. This was a key fact that a reasonable doctor should take into consideration in making a decision of whether to do a brain biopsy. In 1982 there were two million patients affected by stroke versus 10,000 patient affected by brain tumors.3 Information such as this is key in analyzing diagnosis and treatment of patients such as Mr. Meinershagen. It is unclear to me why not all of the demographic facts regarding tumors versus infarcts were not out on the table for the jury to consider.

22. The bottom line of Dr. Fleeson's testimony was that it was an elaborate red herring that led the jury away from the primary decision of whether the biopsy was necessary or not and the injuries and insults Mr. Meinershagen received from the biopsy.

23. The insults are far greater from Dr. Konasiewicz's biopsy, than any pre-existing conditions as noted in the medical records and entries of his contemporaneous physicians, who kept him in his home living on his own.

FN 1 Principles of Neurosurgery, Chapter 10, by Issam Awad, edited by Rengachary and Wilkins, 1997; Neurological Surgery, edited by Youmans, 1994, Chapter 47 and 48; and Principles of Neurology, edited by Adams and Victor, 1977, discussing the risk factors again, exactly the ones mentioned previously.

FN2 Neurological Surgery, edited by Youmans, 1994 at page 1467 and in Chapter 34 in Adams and Victor entitled Cerebrovascular Diseases pages 617-692 discusses this in great detail.

FN3 Neurological Surgery, edited by Youmans, 1994, at page 1465.

See the Affidavit of Robert A. Beatty, M.D., F.A.C.S. of September 7, 2011 attached to the Affidavit of Richard E. Bosse of September 8, 2011 as Exhibit K.

3. Bruce A. Norback, M.D.

Dr. Bruce Norback would have offered the following rebuttal, if he could have testified:

1. Your Affiant is Bruce A Norback, M.D., who is expecting to testify with respect to the issues of negligence, malpractice and causation.

2. Your Affiant, Bruce A Norback, M.D., is a licensed physician who is board certified by the American Board of American Neurology who practices in Bloomington, MN. See my Curriculum Vitae served on June 30, 2011.

3. I was prepared to testified at trial on this matter before the jury in rebuttal on August 10, 2011.

4. I have reviewed Dr. Larkins' and Dr. Fleeson's testimony at trial and have noted a number of areas and opinions to which I could have offered rebuttal.

5. I am in complete agreement to the comments and opinions expressed by Dr. Robert A. Beatty in his affidavit of September 7, 2011 and Dr. Clark C. Watts in his affidavit of September 7, 2011.

6. Dr. Fleeson testified extensively that it was his considered opinion that Mr. Meinershagen would have benefited from being in a nursing home in 2003. There is no argument that at his age, 71, he would have benefited physiologically from being in a nursing home. Most people at this age, would.

7. But most people are not in a nursing home because, like Mr. Meinershagen they choose not to be, and primarily for emotional and psychological reasons so that they could maintain their independent lifestyle. And if these people, like Mr. Meinershagen, were placed in a nursing home in that situation, it could be detrimental to them, emotionally and physically.

8. In that year, from the record, it was apparent that he was investigated by social services who determined that he was able to live on his own. He was also interviewed by a psychiatrist, Dr. Tomac, specifically for the same purpose. This psychiatrist determined that even though most people would not chose to live like Mr. Meinershagen this is how he wanted to live, and she did not recommend removing him from his home. He was also seen on at least four occasions by Dr. Peterson in that year, his personal physician, who took no efforts to remove him from his home, more likely than not for the same reasons found by Dr. Tomac.

9. Also, as stated on page 6 of my independent medical evaluation of June 23, 2011, the primary issue in this case is one of malpractice/deviation from the standard of care. There was absolutely no rush to do a brain biopsy on Mr. Meinershagen on February 21, 2006. Any reasonable neurologist examining him at that time would have followed him conservatively with serial CT/MRI scans, especially since he was improving and, by doing so, would have avoided the hemorrhage/risk of hemorrhage caused by the biopsy. The global insults that Mr. Meinershagen received as a result of Dr. Konasiewicz's biopsy are far greater than any existing insults from his pre-existing conditions of diabetes, vascular disease and hypertension.

See the Affidavit of Bruce A. Norback, M.D. of September 7, 2011 attached to the Affidavit of Richard E. Bosse of September 8, 2011 as Exhibit M.

STANDARD FOR JUDGMENT AS A MATTER OF LAW

Rule 50.02 of the Minnesota Rules of Civil Procedure, a court may issue a judgment as a matter of law where there is no legally sufficient basis for a reasonable jury to find for the prevailing party. Minn. R. Civ. Pro. 50.02 (2007). The standard to be applied in determining the propriety of granting a motion for judgment as a matter of law is whether there is any competent evidence reasonably tending to support the verdict. *Newmaster v. Mahmood,* 361 N.W.2d 130 (Minn. Ct. App. 1985). The evidence must be viewed most favorably to the verdict with all inferences drawn in favor of supporting the verdict. *St. Paul Fire & Marine Ins. Co. v. Honeywell, Inc.,* 611 N.W.2d 51 (Minn. Ct. App. 2000). The court may not weigh the evidence or evaluate the credibility of witnesses in determining whether to grant or deny the motion. *MacBeth v. Mondry,* 392 N.W.2d 24 (Minn. Ct. App. 1986).

Only where the facts are undisputed and reasonable minds can draw but one conclusion does the question become one of law for the court. *Kramer v. Kramer*, 282 Minn. 58, 162 N.W.2d 708 (1968).

STANDARD FOR NEW TRIAL

In the interest of justice, a new trial is granted so that a party may have his case determined free from errors of law or irregularities that would prejudicially affect the decision. *De Losier v. Metcalf*, 248 Minn. 365, 367, 80 N.W.2d 57 (1956). A new trial will be granted in the interest of justice where the issues are close on the facts. *Amland v. Grose*, 208 Minn. 596, 604, 296 N.W. 170 (1940). It is, though, an **abuse** of discretion not to grant a new trial where there is misconduct of an attorney and the case is sharply contested and the evidence close. *Nadeau v. Ramsey County*, 277 N.W.2d 520, 523 (Minn. 1979).

Interpretation of rules of civil procedure presents a question of law which is reviewed de novo. *Wilkins v. City of Glencoe*, 479 N.W.2d 430, 431 (Minn. App. 1992).

ARGUMENT

A. A JUDGMENT AS A MATTER OF LAW OR A NEW TRIAL SHOULD BE GRANTED THE PLAINTIFF ON THE GROUNDS OF ERROR OF LAW OCCURRING AT TRIAL PURSUANT TO MINNESOTA RULES OF CIVIL PROCEDURE, RULES 50 AND 59.01 (F) FOR WHEN THE COURT EXCLUDES ALL PLAINTIFF'S EXPERT REBUTTAL WITNESSES.

Minnesota Rules of Civil Procedure, Rule 59.01(f) [5] provides that errors of law occurring at trial, and objected to at that time or, if no objection need be made pursuant to Rules 46 and 51, are grounds for new trial.

The jury determined this case on the standard of care. [6] They determined in their Special Verdict Form:

1. Was Defendant Stefan J. Konasiewicz, M.D., negligent in his care and treatment of Plaintiff Alan Meinershagen?

YES_____ NO X

The Court excluded the rebuttal testimony of Dr. Watts and Dr. Norback on the Defendant's motion in limine on the grounds of late disclosure. The Court entered its oral order at the close of the Defendants' case, having reserved until that time, but has issued no written order nor memorandum.

Rebuttal evidence is that which explains, contradicts or refutes Defendants' evidence. It does not have to be disclosed and the determination of what constitutes proper rebuttal evidence rests almost wholly in the discretion of the trial court. *State v. Swanson*, 498 N.W.2d 435, 440 (Minn. 1993) citing *State v. Eling*, 355 N.W.2d 286, 291 (Minn. 1984).

But the law is crystal clear in this state that disclosure of rebuttal testimony, evidence and witnesses is not required. *State v. Yang*, 627 N.W.2d 666, 667 (Minn. App. 2001); *State v. Anderson*, 405 N.W.2d 527, 531 (Minn. App. 1987). The Defendants argued that these are criminal cases and therefore not applicable to a civil action. But the Minnesota Court of Appeals has just recently addressed this issue and found that these two decisions are controlling precedent in a civil action, particularly a medical malpractice action involving rebuttal retained experts i.e. physicians. (See the unpublished decision of *Schwerdt v. Lenz*, A10-1448 (Minn. App. 6-13-2011) attached to the Affidavit of Richard E. Bosse of September 8, 2011 as Exhibit N.)

As the Court of Appeals has held, disclosure rules do not apply to rebuttal evidence and rebuttal witnesses. *State v. Yang*, 627 N.W.2d 666, 677 (Minn. App. 2001); *State v. Anderson*, 405 N.W.2d 527, 531 (Minn. App. 1987). The reason is obvious, as

the Court of Appeals of Arkansas recently stated in *Mack-Reynolds Appraisal Co. v. Morton,* 2010 Ark. App. 142, 145 citing *Bryant v. Staffmark, Inc.*, 76 Ark. App. 64, 61 S.W.3d 856 (2001) "...the law judge's ruling was inconsistent with the large body of law that does not require notice of rebuttal witnesses. We also stated that a blanket rule requiring the disclosure of rebuttal testimony was illogical because it is impossible to anticipate the testimony that may need rebutting prior to a hearing."

There is no rule nor one in this case requiring disclosure of any rebuttal. The only order requested a complete list of witnesses, both expert and non-expert, no later than one week prior to the pre-trial conference which had been originally set for July 19, 2011 at 1:00 p.m.. The Plaintiff complied with the same by naming all rebuttal experts above. The Plaintiff made disclosure, as soon as was possible. After receiving Dr. Fleeson's report containing the report of his medical exam on May 6, 2011, Plaintiff found Dr. Norback, under the constraints that Mr. Meinershagen was unable to travel, and review the records in this matter, travel to Duluth to perform a medical exam and issued a report on June 24, 2011 which was transmitted to the Defendants as soon as possible. Interrogatories were answered describing that Dr. Watts, the neurosurgeon, was in agreement with Dr. Beatty's findings and opinions as expressed in his Second Amended and Supplemental Affidavit of July 1, 2011.

Disclosure was made in this case, though not necessary nor required.

The case law, which applies to *undisclosed* experts prior to trial and who are experts for the *case in chief* is that such undisclosed testimony in the *case in chief* should be allowed unless there is a showing that the plaintiffs' failure to disclose was *willful* and that it created *undue prejudice, Phelps v. Blomberg Roseville Clinic,* 253 N.W.2d 390 (Minn. 1977). In *Phelps*, a medical malpractice trial, Dr. Seifert, the plaintiff's expert witness, testified to standard of care and causation in the plaintiff's case in chief. See also *Corfeldt v. Tongen,* 262 N.W.2d 684, 697 (Minn. 1977) and *Dorn v. Home Farmers Mutual Ins. Ass'n.,* 300 Minn. 414, 419, 220 N.W.2d 503, 506 (1974). *No such dereliction on Appellants' counsel can be shown.* Besides their being no duty to disclose rebuttal witnesses, there can be no dereliction nor unjust surprise and prejudice and none was shown.

As the Court of Appeals stated in *State by Spannaus v. Heimer,* 393 N.W.2d 687, 692 (Minn. App. 1986):

> Exclusion of testimony is a harsh sanction, justified only when prejudice would result. *Cornfeldt v. Tongen,* 262 N.W.2d 684, 697 (Minn. 1977). In addition to showing prejudice, the party objecting should move for a continuance. Citing *Phelps, supra.,* 253 N.W.2d at 394. (Emphasis supplied.)

A recent opinion from the Court of Appeals buttresses this law. The Court stated in *State v. Underdahl,* A08-855 (Minn. App. 7-28-2009) (attached to the Affidavit of Richard E. Bosse of September 8, 2011 as Exhibit O) at page 9:

> Defendants should not expect to present exculpatory facts without exposing those facts to scrutiny. *State v. Brown,* 500 N.W.2d 784, 787 (Minn. 1993).

And as the Court of Appeals has held in *Farmers U. Grain Term. v. Industrial Elec.,* 365 N.W.2d 275, 278 (Minn. App. 1985), review denied (Minn. June 14, 1985) (citation omitted):

> We agree that it is unnecessary to require anticipatory rebuttal of defense theories. In the normal course of litigation the defense may assert several theories before trial. Its final position may well depend on seeing the plaintiff's case as presented in court. It would unnecessarily lengthen trials and increase the expense of litigation to require rebuttal of each possible defense theory in the plaintiff's case-in-chief. [7] (Emphasis supplied.)

The Court in this decision defined rebuttal evidence as "...that which explain, contradicts, or refutes the defendant's evidence. Its purpose is to cut down defendant's case and not merely to confirm that of the plaintiff." *Id.* at page 277. The Court further found:

> The fact that testimony would have been more proper for the case-in-chief does not preclude the testimony if it is proper both in the case-in-chief and in rebuttal. *United States v. Luschen*, 614 F.2d 1164, 1170 (8th Cir. 1980). *Id* at 277.

More recently in *Sumstad v. Wilson*, A08-0019 (Minn. App. 1-27-2009) (attached to the Affidavit of Richard E. Bosse of September 8, 2011 as Exhibit P) this Court found that it is not an **abuse** of discretion to permit rebuttal expert testimony of a witness not disclosed before trial. The Court stated:

> The district court allowed Dr. Henseler to testify for the limited purpose of: rebutting the testimony of appellant's witness, Dr. Hunter, on the interpretation of a venogram performed by Dr. Henseler on appellant. We conclude that the admission of this testimony was not an **abuse** of discretion.

In regards to Dr. Fleeson's testimony, the Plaintiff made a strategic decision to wait to hear what the testimony of Dr. Fleeson was going to be and what areas he was going to cover in that he had been asked two questions which he answered in his report by Defendants' counsel. If Plaintiff's counsel had attempted to rebut Dr. Fleeson in his case in chief he would have rebutted the second question which was not addressed during Dr. Fleeson's direct. As the Court of Appeals said in *Farmers U. Grain Term. v. Industrial Elec.*, 365 N.W.2d 275, 278 (Minn. App. 1985), review denied (Minn. June 14, 1985) (citation omitted) it is unnecessary to require anticipatory rebuttal of defense theories because it would unnecessary lengthen trials and increase the expense of litigation.

Under *Phelps v. Blomberg Roseville Clinic*, 253 N.W.2d 390 (Minn. 1977), even if these were experts in the *Plaintiff's case in chief*, the Defendants must establish the elements i.e. (1) the Plaintiff's failure to disclose was *willful* and (2) that it created *undue prejudice*. The Supreme Court has held that if these two elements are not established undisclosed testimony of an expert for the case in chief should be allowed. The Defendants have failed to argue let alone even begin to establish any willfulness on the Plaintiff's part. Under the facts as outlined above there was no willfulness. On learning that Dr. Beatty was going to be unavailable for rebuttal in the second week of trial Dr. Watts as found, reviewed the records including the affidavits of experts and depositions and was disclosed such cannot be willful. Upon receiving a tardy report by Dr. Fleeson, Dr. Norback was found, located, reviewed the records including affidavits and depositions, traveled from Minneapolis to Duluth to perform a medical examination, issued a report which was immediately served upon the Defendants. Such cannot be willful.

But more importantly, the Defendants must establish prejudice. They have argued prejudice but they have not established what the prejudice maybe. There can be no prejudice for rebuttal testimony, because as the Court of Appeal has stated in the numerous decisions cited above counsel cannot anticipate what rebuttal evidence will be necessary. There are no new theories being put forth by the Plaintiff, the only new theory is that the late disclosure by Dr. Fleeson, Defendants' expert, that Mr. Meinershagen has caused his own injuries because of his failure to take care of his diseases. Dr. Norback, Plaintiff's expert, has issued a report after his medical examination rebutting the same. It is the Defendants' theory. There can be no prejudice. They have their own experts in both of these areas.

As the Court of Appeals held *Norwest Bank Midland v. Shinnick*, 402 N.W.2d 818, 823 (Minn. App. 1987) "The general rule in Minnesota is expert testimony should be suppressed for failure to make a timely disclosure of the expert's identity *only* where *'counsel's dereliction* * * * is inexcusable and results in disadvantage to his opponent.' " citing *Dennie v. Metropolitan Medical Center*, 387 N.W.2d 401, 405 (Minn. 1986). The court further stated "The crucial question is whether the late disclosure resulted in any appreciable degree of prejudice. *Id.* (citing *Phelps*, 253 N.W.2d at 394)."

In addition to showing prejudice, the party objecting should move for a continuance as found by the appellate court in *State by Spannaus v. Heimer*, 393 N.W.2d 687, 691 (Minn. App. 1986) "In addition to showing prejudice, the party objecting should move for a continuance. *Phelps*, 253 N.W.2d at 394." Defendant St. Luke's in its motion in limine of July 19, 2011 moved

for a continuance and then withdrew it before trial as reflected by the Pre-Trial Order of the Court of August 1, 2011. Thus, a continuance was not requested and this element of *Phelps* was not met for the exclusion of the rebuttal experts.

The Court of Appeals has recently decided the issue head-on in the unpublished decision of *Schwerdt v. Lenz,* A10-1448 (Minn. App. 6-13-2011) attached to the Affidavit of Richard E. Bosse of September 8, 2011 as Exhibit N, a medical malpractice case, involving rebuttal retained experts. The Court stated:

> The plaintiff is not required to make an anticipatory rebuttal of defense theories. *Id.* at 278. Because of this, we caution the district court against making a decision in limine to exclude a party's rebuttal witnesses before the presentation of testimony. The district court has no basis for excluding the testimony of rebuttal witnesses when it has yet to hear the testimony that a party proposes to rebut.

B. A JUDGMENT AS A MATTER OF LAW OR A NEW TRIAL SHOULD BE GRANTED THE PLAINTIFF ON THE GROUNDS OF ACCIDENT AND SURPRISE PURSUANT TO MINNESOTA RULES OF CIVIL PROCEDURE, RULES 50 AND 59.01(C) DUE TO THE NONDISCLOSURE OF THE TESTIMONY OF DEFENDANTS' EXPERTS, MARK V. LARKINS, M.D.

Minnesota Rules of Civil Procedure, Rule 59.01(c)[8] provides that a new trial maybe granted on the grounds of accident or surprise which could not have been prevented by ordinary prudence.

The Plaintiff's counsel was surprised by the testimony of the Defendants' expert doctor, Dr. Mark V. Larkins.

It is apparent from his disclosure that Dr. Larkins did not discuss the following: edema, hyper density and interpretation of tumor in regards to the CT scan; irregularly enhancing lesion, mass effect, T2 Flair Axial, neurosurgeon's prospective in regards to the MRI scan; sudden onset and improving symptoms in regards to symptoms; fast growing lesions and aggressive tumors; speaking to the patient; and rush to judgment. See pages 12 to 15 hereof under Facts. He further admitted on the stand to his nondisclosure. See pages 15 to 17 of Facts.

Expert disclosure is provided by Rule 26.02(e) of the Minnesota Rules of Civil Procedure which states:

> A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

The Advisory Committee, in its comments to the Rules in 1975 stated:

> Trial preparation is substantially hampered by an inability to anticipate *fully* the expected testimony of opposing experts. Thus Rule 26.02(a)(A)(i) requires a party to respond to interrogatories ... (emphasis added.)

Fully is described by Webster's Universal English Thesaurus, 2004 as all inclusive, complete, comprehensive, detailed, entire, unabridged, uncut, unedited.

The failure to follow this Rule and to provide disclosure can only cause surprise upon the Plaintiff and his counsel. Such surprise is prejudicial. The Plaintiff will be precluded from submitting rebuttal testimony in his case in chief, if he so desires[9] as to

this issue or any other undisclosed issue and without such non-disclosed testimony being unrebutted the jury can only find in favor of the Defendant on such issue, as it did in this case.

This is acutely prejudicial for medical malpractice plaintiff's in Minnesota who must pursue claims in the conspiracy of silence among Minnesota doctors. Minnesota physicians will not testify against other Minnesota physicians so that plaintiff's must find experts outside Minnesota at an additional expense for the expert's time and travel.

Without full disclosure, the plaintiff's experts are unable to rebut defendant's experts in the plaintiff's case in chief and plaintiff must attempt to bring such experts back at additional expense and costs. Often times, such busy professionals are unable to accommodate a second unscheduled trip to Minnesota usually during the same week. Such causes extreme prejudice to plaintiff's and is contrary to the intent of the Rules of Civil Procedure as enunciated in Rule 1, which provides that the Rules "...shall be construed and administered to secure the just, speedy and *inexpensive* determination of every action." (emphasis supplied) [10]

This error became compounded in this case because the Plaintiff's were prepared to bring back several rebuttal witnesses to refute each and everyone of the issues enunciated above.

As the Supreme Court stated in *Dorn v. Home Farmers Mutual Ins. Assn.*, 300 Minn. 414m 419, 220 N.W.2d 503 (1974):

> We hasten to add that one of the primary purposes of pretrial interrogatories is to prevent unjust surprise at trial. While we recognize that our trial courts must have some discretion in this area, we caution that this court will carefully scrutinize situations such as the one at issue.

The Court reiterated that it would carefully scrutinize situations in *Wojciecjowski v. William D. Stanley Shows*, 378 N.W.2d 87,89 (Minn. App. 1985) and further added "Factors to be considered are the willfulness of the failure to disclose the resulting prejudice, and the harm to the truth-seeking process..." citing *Corfeldt v. Tongen*, 262 N.W.2d 684, 697 (Minn. 1977).

It needs to be kept in mind that Minnesota Rules of Civil Procedure Rule 26 prohibits the taking of the depositions of experts. Such has been established as a cost of saving measure pursuant to Rule 1 of the same rules.

But this cost of saving measure becomes a heavy burden and heavy costs to the Plaintiff who is unable to respond and rebut material testimony upon which the jury is to decide.

The Plaintiff is precluded by the rules [11] from taking the depositions of the Defendants' experts to ferret this out. Thus, the importance that the rules place upon the Defendants' counsel in his expert disclosure to "fully" disclose "the expected testimony" of his experts so that Plaintiff can anticipate and prepare for the same.

The Court of Appeals has held that because of an expert's potential to influence the jury, the trial judge must exercise caution not to admit expert testimony if it would be unfairly prejudicial. *State v. Vue*, 606 N.W.2d 719 at 722 (Minn. Ct. of Appeal 2000) *review denied* May 16, 2000.

This becomes compounded when recent studies have shown that jurors give the benefit of doubt to Defendant doctors in medical malpractice cases. See *Doctors & Juries*, 105 Michigan Law Review 1453 (2007) in which Professor Phillip G. Peters, Jr. synthesized three (3) decades of jury research in medical malpractice cases. He found at page 1491:

> When the jury is in doubt, the benefit of that doubt goes to the defendant. This caution gives shelter to physicians who, in the eyes of their peers, have violated the standard of care .... That is precisely the opposite of the effect that the jury's lack of expertise is commonly thought to have on jury verdicts. Critics assume that the "battle of the experts" frees juries to award unjustified recoveries. The data suggest that it is more likely to shelter negligent physicians. Thus, the common presence of clinical uncertainty and professional

> disagreement may actually help defendants in the courtroom, rather than create confusion that the plaintiff's attorney can exploit.

This becomes *a fortiari* when the Court has excluded any rebuttal expert evidence for the Plaintiff's, who had expert witnesses prepared to rebut each and every undisclosed issue. [12]

C. A JUDGMENT AS A MATTER OF LAW OR A NEW TRIAL SHOULD BE GRANTED THE PLAINTIFF ON THE GROUNDS OF MISCONDUCT OF DEFENSE COUNSEL PURSUANT TO MINNESOTA RULES OF CIVIL PROCEDURE, RULES 50 AND 59.01(B) IN THAT HE FAILED TO MAKE PROPER DISCLOSURE OF THE TESTIMONIES OF MARK V. LARKINS, M.D.

Minnesota Rules of Civil Procedure, Rule 59.01(b) [13] provides that a new trial may be granted for misconduct of the prevailing party.

Defendants' counsel failed to make proper disclosure of Dr. Mark V. Larkins' testimony by way of his affidavit of February 1, 2011. See the Facts above pages 12 through 15. He admitted to such nondisclosure. See the Facts above pages 15 through 17.

Such improper disclosure is a ground for new trial. *Lundin v. Stratmoen,* 250 Minn. 555, 559, 85 N.W.2d 828 (1957).

The failure to fully disclose which the rule requires [14], creates situations for **abuse** as occurred in this case. [15] When the case is sharply contested and the issue in evidence are close, misconduct of counsel is considered prejudicial and it is an **abuse** of discretion not to grant a new trial. *Nadeau v. County of Ramsey,* 277 N.W.2d 520, 523 (Minn. 1979).

This becomes *a fortiari* when the Court has excluded any rebuttal expert evidence for the Plaintiff.

D. A JUDGMENT AS A MATTER OF LAW OR A NEW TRIAL SHOULD BE GRANTED THE PLAINTIFF ON THE GROUNDS OF ERROR OF LAW FOR THE COURT DENYING THE PLAINTIFF'S MOTION TO COMPEL THE DEPOSITIONS OF PLAINTIFF'S TREATING PHYSICIANS PURSUANT TO MINNESOTA RULE OF CIVIL PROCEDURE, RULE 35.04.

On June 20, 2011 the Court denied the Plaintiff's Motion to Compel the Depositions of Dr. Ekberg and Dr. Semotuk, treating radiologists, located at St. Luke's Hospital. By the same Order, the Court also denied the motion of the Plaintiff to take the depositions of treating physicians Dr. Knuths and Dr. Peterson, employees of the Defendant St. Luke's. Dr. Peterson later testified at trial on behalf of the Defendants.

Minn. R. Civ. P. 35.04 [16] provides that when a party has waived his medical privilege pursuant to Rule 35.03 [17] by voluntary placing in controversy his physical condition, he shall upon request by the adverse party, provide copies of medical reports and written authority to permit inspection of all hospital and medical records. “Depositions of treating or examining medical experts shall not be taken except upon order of the court ...” provided in the Rule precludes the adversary, in this case the Defendants, from taking the treating physician, the radiologists, depositions. As the Advisory Committee Note - 1968 [18] states:

The limitation on depositions is not applicable to the taking of the testimonial [19] deposition of a party's own medical expert.

The Rule is designed to protect the patient's treating physicians from deposition by his adverse party i.e. the Defendants. This was reaffirmed by the Minnesota Supreme Court in *Wenninger v. Muesing,* 307 Minn. 405, 410, 240 N.W. 2d 333 (1976):

> We are persuaded for the reasons stated below that the procedure for disclosing privileged medical testimony set forth in Rule 35.04 is, and ought to be, the exclusive means by which an adverse party may discover testimony relating to a patient's physical, mental, or blood condition, and we hold that Rules 35.03 and 35.04 in their formulation by the advisory committee and adoption by the court did not contemplate unilateral, private interviews by the inquiring party of the waiving party's treating physician. [20] (Emphasis added.)

In making it's ruling, this Court in the instant case relied upon Minn. Stat. § 595.02 which provides:
Subdivision 5

A party who commences an action for malpractice, error, mistake, or failure to cure, whether based on contract or tort, against a health care provider on the person's own behalf or in a representative capacity, waives in that action any privilege existing under subdivision 1, paragraphs (d) and (g), as to any information or opinion in the possession of a health care provider who has examined or cared for the party or other person whose health or medical condition has been placed in controversy in the action. This waiver must permit all parties to the action, and their attorneys or authorized representatives, to informally discuss the information or opinion with the health care provider if the provider consents. Prior to an informal discussion with a health care provider, the *defendant* must mail written notice to the other party at least 15 days before the discussion. The plaintiff's attorney or authorized representative must have the opportunity to be present at any informal discussion. Appropriate medical authorizations permitting discussion must be provided by the party commencing the action upon request from any other party. (emphasis supplied)

A health care provider may refuse to consent to the discussion but, in that event, the party seeking the information or opinion may take the deposition of the health care provider with respect to that information and opinion, without obtaining a prior court order. (Emphasis added)

It is respectfully submitted, that the Court had totally disregarded the language and protocol set forth in the statute. The waiver is signed by the party who commences an action for malpractice, i.e. the Plaintiff or counter-plaintiff. The statute specifically states that the defendant must mail written notice for the informal conference. The statute purpose is to specifically provide the defendants' attorney an opportunity for pre-trial discovery solely by way of an informal conference since they are precluded by Rule 35 from taking treating physicians depositions. A plaintiff is never prohibited from conferring with a treating physician, privately, except in such medical malpractice cases where such treating physician is an employee of a defendant, the plaintiff's counsel is ethically prohibited from such discussion. [21] As discussed below, the comment to Rule 35 permits such depositions. It further specifically provides the plaintiff's attorney must have the opportunity to be present at the informal discussion within fifteen (15) days notice.

The Court has had to read into the statute that the Plaintiff's must mail written notice and that the Defendants' attorney must have an opportunity to be present. Such is not the case.

The Court has construed the language which is clear and unambiguous. The Court may not construe statutory language that is precise and unambiguous. *Graber v. Peter Lametti Constr Co.,* 293 Minn. 24, 197 N.W.2d 443 (1972). Words of a statute are to be given their ordinary meaning. *Humenansky v. Minnesota Bd of Medical Examiners,* 525 N.W.2d 559 (Minn. Ct. App. 1994). See Minn. Stat. § 645.08 (1). When the words of the law and their application to the existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under pretext of pursuing the spirit. Minn. Stat. § 645.16. And finally a statute should be read as a whole with other statutes that address the same subject. *E T 0 Inc. v. Town of Marion,* 361 N.W.2d 91 (Minn. Ct. App. 1985), *rev'd on other grounds* 375 N.W.2d 815 (Minn. 1985).

The statute must be read in conjunction with Minn. R. Civ. P. 35.04 “that depositions of treating or examining medical experts shall not be taken except upon order of the court”, precluding the adversary, in this case the Defendants, from taking the treating physicians' deposition but as the Advisory Committee Note states:

> Limitation on depositions is not applicable to the taking of the testimonial deposition of a party's own medical expert.

E. A JUDGMENT AS A MATTER OF LAW OR A NEW TRIAL SHOULD BE GRANTED THE PLAINTIFF ON THE GROUNDS OF ERROR OF LAW FOR THE COURT AWARDING ATTORNEY FEES AGAINST THE PLAINTIFF ON THE PLAINTIFF'S MOTION TO COMPEL THE DEPOSITIONS OF THE TREATING PHYSICIANS.

The Court in it's Order of June 20, 2011 has awarded attorney fees against the Plaintiff on his motion to compel. The Court states at paragraph 2 of it's Order:

> 2. Attorneys' fees in the amount of $500 shall be paid by Plaintiff to Attorney Charles Bateman, $500 shall be paid by Plaintiff to Attorney Shawn Raiter, and $500 shall be paid by Plaintiff to Attorney Cecilie M. Loidolt.

Minnesota Rules of Civil Procedure, Rule 37.01 (d) [22] provides in subparagraph 2:

(2) If the motion is denied, the court may enter any protective order authorized under Rule 26.03 and shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust. (Emphasis added)

The Court never “afforded an opportunity to be heard”.

As stated in the issue above, precluding the Plaintiff the right to take these depositions was also error.

F. A JUDGMENT AS A MATTER OF LAW OR A NEW TRIAL SHOULD BE GRANTED THE PLAINTIFF ON THE GROUNDS OF ERROR OF LAW IN THE COURT DENYING PLAINTIFF'S MOTION FOR LEAVE TO TAKE THE DEPOSITIONS OF THE DEFENDANTS' RETAINED EXPERTS.

The Court in it's Order of July 8, 2011 denied the Plaintiff's motion to take the depositions of Defendants' retained experts, Dr. Mark V. Larkins and Dr. William P. Fleeson. The Court stated:

> 1. Plaintiff's motion to take the depositions of Defendants' retained experts, Dr. Mark V. Larkins and Dr. William P. Fleeson, is denied for the reasons set forth in the Court's Memorandum filed on June 20, 2011.

The Plaintiff had moved to take such depositions due to the lack of full disclosure and incompleteness of the disclosure by these retained experts. See pages 12 to 15 to the Facts above. Dr. Larkins admitted to such nondisclosure on the stand. See pages 15 to 17 of the Facts.

The Court appears to be relying upon Minn. Stat. § 595.02 and Minn. R. Civ. P. 35.04. But both of these preclude the deposition of treating or examining medical experts, i.e. Rule 35.04 or the health care provider who has examined or cared for the party. Such is not applicable to the case at hand in that both of these experts are retained experts.

Minn. R. Civ. P. 26.02 [23] provides that the depositions of retained expert by an adversary maybe taken upon order of the court without establishing good cause.

The same rule, Minn. R. Civ. P. 26.02 (e) providing for expert disclosure states:

> A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

The Advisory Committee, in its comments to the Rules in 1975 stated:

> Trial preparation is substantially hampered by an inability to anticipate *fully* the expected testimony of opposing experts. Thus Rule 26.02(a)(A)(i) requires a party to respond to interrogatories ... (emphasis added.)

As the Supreme Court has reiterated in *Dorn v. Home Farmers Mutual Ins. Assn.,* 300 Minn. 414, 419, 220 N.W.2d 503 (1974) that the primary purpose of pre-trial interrogatories is to prevent unjust surprise at trial.

In *Sorenson v. St. Paul Ramsey Medical Center*, 457 N.W.2d 188, 193 (Minn. 1990) the Supreme Court has found this language in the rule, in discussing the identical language in Minn. Stat. § 145.682, subd. 4, requires exclusively in medical malpractice actions a "highly detailed disclosure" mandating "...specific details concerning their expert testimony...". Contrary to the interpretation of the same language for all other causes is a "general disclosure requirement" because of the language of "substance" and "summary" suggesting such. Their disclosures, as reflected above, do not meet this "highly detailed disclosure" of "....specific details concerning their expert testimony".

Rule 26.02 providing for the depositions of retained experts does not have a requirement of the establishment of good cause. Thus, the Plaintiff need not establish such. Even without such a requirement, it is suggested that the Plaintiff has established such good cause in the failure of the Defendants to meet the rigors of the *Sorenson* disclosure and Rule 26.02 in medical malpractice.

G. A JUDGMENT AS A MATTER OF LAW OR A NEW TRIAL SHOULD BE GRANTED THE PLAINTIFF ON THE GROUNDS OF ERROR OF LAW IN THE COURT GRANTING THE DEFENDANTS' MOTION IN LIMINE PROHIBITING ANY ARGUMENT, INSINUATION OR REFERENCE THAT THERE WAS A VIOLATION OF THE HIPPOCRATIC OATH AND/OR THAT THE HIPPOCRATIC OATH IS THE STANDARD OF CARE.

The Defendants served a motion in limine on July 19, 2011 requesting the Court to prohibit any argument, insinuation, or reference that there was a violation of the Hippocratic Oath and/or that the Hippocratic Oath is the standard of care, particularly that first do no harm. They cited no case directly on point, but argued that such was not a standard of care. The Court, in it's Pre-Trial Order of August 1, 2011, without citing any authority, granted the motion.

An exhaustive research of the law in this county has found not one case to support the Defendants. To the contrary, the courts of this country, including this state, have described the first principle of the Hippocratic Oath i.e. first do no harm, as the standard of care, the first codification of the standard of care, a physician's most important objective, the principle by which doctors are guided, the cardinal principle of medicine, and that physician's are ethically bound by the principle.

In *Boutte v. Jefferson Parish*, 807 So.2d 895, 899 (La. App. 5 Cir. 1/15/02) the Court found that the standard of care requires consistency with the medical ethics which requires healthcare providers "first do no harm". In a concurring opinion in *Gross v. Department of Health*, 819 So.2d 997, 1006 (Fla. App. 5 Dist. 2002) Judge Orfinger stated " 'First, do no harm.' Those words, written by Hippocrates nearly 2,500 years ago, set forth the most fundamental precept of medicine and perhaps represent the first codification of a medical practitioner's standard of care." In *Siharath v. Sandoz Pharmaceuticals Corp.*, 131 F. Supp.2d 1347, 1372 (N.D. Ga. 2001) the court stated "This shortcut aids doctors in their clinical practices because their most important objective day-to-day is to help their patients and 'first, do no harm,' as their Hippocratic oath requires." The court stated in *Welch v. U.S.*, 737 F. Supp.2d 18, 29 (D. Me. 9-14-2010) "Guided by the principal of 'first do no harm,' Dr. Ryan and Dr. Berger confirmed ...". In *Kovacs v. Bauer*, 118 Ohio App.3d 591, 604, 693 N.E.2d 1091 (1996) the court found "... regardless of the circumstances, act in an negligent manner or cause further injury to the plaintiff in violation of the cardinal principle of medicine - *primum non nocere* (first, do no harm)." The court in *Heinrich Ex Rel. Heinrich v. Sweet*, 118 F. Supp.2d 73 (D. Mass. 2000) found "Sweet violated the cardinal principle of the Hippocratic oath, 'First, do no harm.' " In *U.S. v. Cunningham*, 556 F. Supp.2d 968, 975 (S.D. Iowa 2008) the court found that "... a treating physician is ethically bound by the principle of 'first do no harm.' " In *Nieto v. Kapoor*, 268 F.3d 1208, 1223 (10th Cir. 2001) the 10th Circuit cited the Hippocratic oath with approval as the Maryland Supreme Court did in *Finucan v. Board of Physician*, 380 Md. 577, 599, 846 A.2d 377 (2004). In the *State v. Weatherspoon*, 514 N.W.2d 266, 301 (Minn. App. 1994) Judge Randall in his special concurrence stated "I suggest that is so if we are to heed a tenet of the ancient Hippocratic Oath, 'Physician, first do no harm.' "

H. A JUDGMENT AS A MATTER OF LAW OR A NEW TRIAL SHOULD BE GRANTED THE PLAINTIFF IN THAT THE COURT COMMITTED ERROR IN DENYING THE PLAINTIFF'S MOTION TO TAKE THE DEPOSITIONS OF THE DEFENDANTS' RETAINED EXPERTS IN LIGHT OF THE NONDISCLOSURE OF SUCH EXPERTS AND THE COURT'S EXCLUSION OF REBUTTAL WITNESSES WHICH MAKES THE APPLICATION OF MINN. STAT. § 145.682 ON THE PLAINTIFF UNCONSTITUTIONAL AS THE DENIAL OF EQUAL PROTECTION AND DUE PROCESS.

As stated above, the *Sorenson* court found that the language in Rule 26 of the Minnesota Rules of Civil Procedure, provides for only a "general disclosure requirement" because the language of the rule is of "substance" and "summary". The *Sorenson* court found that Minn. Stat. § 145.682 holds the plaintiff specifically and exclusively in a medical malpractice action to a higher standard of "a highly detailed disclosure" of ".. specific details concerning their expert testimony". Defendants' expert, Dr. Larkins, admitted his affidavit was not highly detailed. He even admitted that he did not set forth the grounds for his opinion as required by the rule ("and a summary of the grounds for each opinion").

As described above, the Plaintiff moved for leave to take the deposition of Dr. Larkins to ferret out these nondisclosures. Such motion was denied by the Court, without authority. At trial, the Plaintiff had rebuttal witnesses available, as described above, to rebut these non-disclosed items to which he testified at trial. These rebuttal witnesses were excluded by the Court.

The double standard, much higher standard for the plaintiff under Minn. Stat. § 145.682 without the same standard for the defendant makes § 145.682 unconstitutional and a violation of the equal protection clause of the United States Constitution Amendment XIV. As the Supreme Court stated in the *City of St. Paul v. Dalsin*, 245 Minn. 325, 331, 71 N.W.2d 855 (1955) "It is elementary that a classification to be valid must embrace and uniformly affect all who are similarly situated, ..." i.e. all litigants in medical practice actions. To paraphrase the Supreme Court:

> In the instant case there is discrimination among those who are similarly situated. All litigants are not treated alike under this statute. The plaintiff's are forced to provide a highly detailed disclosure. If they do not the case is subject to dismissal. On the other hand, the defendants have no such requirement and only need to disclose in a general fashion. Clearly, the statute does not operate uniformly on all litigants in the same lawsuit. Thus, when a statute imposes restrictions upon one class of persons engaged in a particular pursuit

> which are not imposed upon others engaged in the same pursuit and under similar circumstances, there is a violation of the equal protection clause, thereby rendering the ordinance unconstitutional. [24]

In *Henke v. Dunham,* 450 N.W.2d 595 (Minn. App. 1990) the Supreme Court found this particular statute to be constitutional under the facts of that case as to equal protection for the plaintiff, vis-à-vis other plaintiff's, requiring them to file the same disclosure, but not plaintiff's vis-à-vis defendants, litigants in the same proceeding and filing different disclosures.

The issue was raised before the Court in the Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss under Minn. Stat. § 145.682 of June 22, 2011 which the Court reserved ruling, and for which a ruling has never been made pursuant to the Plaintiff's review of the record.

Furthermore, due process and the right to a fair jury trial requires under these circumstances that when the Plaintiff is not granted leave to take the depositions of the retained experts who has filed a disclosure which are not highly detailed and further under Rule 26 which do not even state grounds, pursuant to the expert's admission, the Plaintiff is to be permitted rebuttal experts. In *Stanford v. Stanford,* 266 Minn. 250, 256, 123 N.W.2d 187 (1963) the Supreme Court found that well grounded principles which are an integral part of due process under both our federal and state Constitutions require an opportunity to test the credibility of the evidence through cross-examination or otherwise “and to meet” or answer every adverse fact or inference included therein.

More than several courts in this country have found that there is a right to rebuttal. See *Johnson v. Van Werden,* 255 Iowa 1285, 1290, 125 N.W.2d 782 (1964), *Wetzel v. Roemerman,* 737 N.W.2d 326 (Iowa App. 2007), *Katz v. Enzer* (Hamilton Co) 29 Ohio App. 3d 118, 29 Ohio BR 133, 504 NE2d 427, and the denial of that right would be an error of law. *Underhill v. Stephenson* (Ky) 756 SW2d 459; *Whittington v. American Oil Co.* (La App 4th Cir) 508 So 2d 180, cert den (La) 512 So 2d 436, *Teller v. Schepens,* 25 Mass App 346, 518 NE2d 868, review den 402 Mass 1102, 521 NE2d 398.

As McFarland and Keppel state in *Minnesota Civil Practice,* 3rd Edition, § 2070 at page 1318:

> Through proper utilization of available discovery devices, plaintiff's counsel should be able to plan rebuttal to the defendant's proof in advance of trial. A tactical decision is then made as to whether this proof will be offered during the plaintiff's case-in-chief or reserved until rebuttal. Usually, such proof has more impact after the defendant's case has rested, since the jury may recall the plaintiff's final witnesses or exhibits in greater detail. Emphasis is heightened if rebuttal is short so that the final rebuttal witness' testimony is not confused by other proof. On the other hand, merely repetitious testimony may tend to aggravate the trier of fact who has already sat through a long trial. Thus, as a tactical matter, counsel calling rebuttal witnesses should ensure that the testimony is critical, interesting, and relatively brief.

CONCLUSION

Based upon the foregoing factual points and legal authority, Plaintiff respectfully requests this Court to grant a judgment as a matter of law or in the alternative, a new trial.

Dated: 9/8/11

LAW OFFICES OF RICHARD E. BOSSE, CHARTERED

By <<signature>>

Richard E. Bosse #0245

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Footnotes

1 Intra -- Prefix meaning *within.* Parenchyma - The essential parts of an organ that are concerned with its function in contradistinction to its framework. Hemorrhage - Blood loss. The term is usually used to describe episodes of bleeding that last more than a few minutes, compromise organ or tissue perfusion, or threaten life. *Taber's Cyclopedic Medical Dictionary* (21st ed. 2009).

2 Hemiplegia - Paralysis of one side of the body, usually resulting from damage to the corticospinal tracts of the central nervous system. *Taber's Cyclopedic Medical Dictionary* (21st ed. 2009).

3 See Footnote #1 above for definition.

4 See Footnote #2 above for definition.

2 Hemiplegia - Paralysis of one side of the body, usually resulting from damage to the corticospinal tracts of the central nervous system. *Taber's Cyclopedic Medical Dictionary* (21st ed. 2009).

5 59.01. Grounds

A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes:

(a) Irregularity in the proceedings of the court, referee, jury, or prevailing party, or any order or **abuse** of discretion, whereby the moving party was deprived of a fair trial;

(b) Misconduct of the jury or prevailing party;

(c) Accident or surprise which could not have been prevented by ordinary prudence;

(d) Material evidence newly discovered, which with reasonable diligence could not have been found and produced at the trial;

(e) Excessive or insufficient damages, appearing to have been given under the influence of passion or prejudice;

(f) Errors of law occurring at the trial, and objected to at the time or, if no objection need have been made pursuant to Rules 46 and 51, plainly assigned in the notice of motion;

(g) The verdict, decision, or report is not justified by the evidence, or is contrary to law; but, unless it be so expressly stated in the order granting a new trial, it shall not be presumed, on appeal, to have been made on the ground that the verdict, decision, or report was not justified by the evidence.

On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct entry of a new judgment.

6 CIVJIG 80.10 Definition of “negligence” by a professional healthcare provider provides:

Negligence is the failure to use reasonable care under the circumstances.

Reasonable care by a (doctor, dentist, advanced practice nurse, specialist or other healthcare provider) is care that meets an accepted standard of care a (doctor, dentist, advanced practice nurse, specialist or other healthcare provider), who is in a similar practice would use or follow under similar circumstances. A failure to provide care that meets an accepted standard of care under the circumstances would be negligence.

7 See McFarland, D., & Keppel, W. (1999). *Minnesota Civil Practice.* (3rd ed). § 2007. pp. 1231-1236 for discussion as to this strategy decision available to the plaintiff.

8 See Footnote 5 above.

9 See the Court of Appeal's discussion in *Farmers U. Grain Term. v. Industrial Elec.*, 365 N.W.2d 275, 278 (Minn. App. 1985), review denied (Minn. June 14, 1985) (citation omitted):

We agree that it is unnecessary to require anticipatory rebuttal of defense theories. In the normal course of litigation the defense may assert several theories before trial. Its final position may well depend on seeing the plaintiff's case as presented in court. It would

unnecessarily lengthen trials and increase the expense of litigation to require rebuttal of each possible defense theory in the plaintiff's case-in-chief.

10 Rule I of the Rules of Civil Procedure states:

These rules govern the procedure in the district courts of the State of Minnesota in all suits of a civil nature, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

11 Minn. R. Civ. Pr., Rule 26.02(e)

(e) Trial Preparation: Experts.

Discovery of facts known and opinions held by experts, otherwise discoverable pursuant to Rule 26.02(a) and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(1)(A) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (B) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to Rule 26.02(e)(3), concerning fees and expenses, as the court may deem appropriate.

(2) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35.02 or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(3) Unless manifest injustice would result, (A) the court shall require the party seeking discovery to pay the expert a reasonable fee for time spent in responding to discovery pursuant to Rules 26.02(e)(1)(B) and 26.02(e)(2); and (B) with respect to discovery obtained pursuant to Rule 26.02(e)(1)(B), the court may require, and with respect to discovery obtained pursuant to Rule 26.02(e)(2) the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

12 See the Affidavit of Robert A. Beatty, M.D., F.A.C.S. of September 7, 2011, Affidavit of Clark C. Watts, M.D. of September 7, 2011 and the Affidavit of Bruce A. Norback, M.D. of September 7, 2011.

13 See Footnote 5 above.

14 See the discussion on Rule 26 on page 40 of this Memorandum.

15 See *Dennie v. Metropolitan Medical Center*, 387 N.W.2d 401 (Minn. 1986).

16 Minn. R. Civ. P. 35.04. Medical Disclosures and Depositions of Medical Experts

When a party has waived medical privilege pursuant to Rule 35.03, such party within 10 days of a written request by any other party,

(a) shall furnish to the requesting party copies of all medical reports previously or thereafter made by any treating or examining medical expert, and

(b) shall provide written authority signed by the party of whom request is made to permit the inspection of all hospital and other medical records, concerning the physical, mental, or blood condition of such party as to which privilege has been waived.

Disclosures pursuant to this rule shall include the conclusions of such treating or examining medical expert.

Depositions of treating or examining medical experts shall not be taken except upon order of the court for food cause shown upon motion and notice to the parties and upon such terms as the court may provide.

17 Minn. R. Civ. P. 35.03. Waiver of Medical Privilege

If at any stage of an action a party voluntarily places in controversy the physical, mental, or blood condition of that party, a decedent, or a person under that party's control, such party thereby waives any privilege that party may have in that action regarding the testimony of every person who has examined or may thereafter examine that party or the person under that party's control with respect to the same physical, mental, or blood condition.

18 Advisory Committee Note - 1968. Medical records as used in this Rule include the office records of any medical expert, and x-rays, E.E.G.'s and all similar items. The limitation on depositions of medical experts is applicable to both treating and examining medical experts. The purpose for the limitation is to insure that depositions of medical experts will be taken only upon court order. In making its order the court can and should consider the extent of medical disclosure through medical reports and inspection of hospital and medical records. Protective orders under Rule 30.02 are available to the parties to further limit or prevent involuntary medical examination or disclosure of medical information in those cases where the protection provided in Rule 35.04 is not sufficient. Rule 37 will provide the means for obtaining a court order requiring a party to comply with the disclosure requirements of Rule 35.04. At such Rule 37 hearing, the court may properly determine whether or not the medical information sought is the same physical, mental or blood condition as to which privilege has been waived.

The limitation on depositions is not applicable to the taking of the testimonial deposition of a party's own medical expert.

19 *Black's Law Dictionary* 1485 (7th ed. 1999) defines testimony as *"n.* Evidence that a competent witness under oath or affirmation gives at trial or in an affidavit or deposition. Also termed *personal evidence.* - testimonial, *adj."*

20 It was apparent to Plaintiff's counsel and his litigation assistant that on their conference with Dr. Ekberg that he had already spoken with Defendant's counsel on the matter and had reviewed films and the chart entry well before he had counsel "in the matter". Such unilateral private interview was not only a violation of the rules, as stated by the Supreme Court, but also HIPAA, the Minnesota Plaintiff's Rights Act and the AMA's Code of Medical Ethics, Opinion 5.05.

21 Rules of Professional Conduct, Rule 4.2. Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

But in 2005 Comment the draftsman state:

[7] In the case of a represented organization, this rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

It is suggested that such ethical consideration does not prohibit such discussion with any of these witnesses, but most often the treating physicians in medical malpractice cases have been instructed to refuse to have these private communications.

22 Rule 37.01. Motion for Order Compelling Discovery

(d) Expenses and Sanctions.

(1) If the motion is granted, or if the requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified or that other circumstances make an award of expenses unjust.

(2) If the motion is denied, the court may enter any protective order authorized under Rule 26.03 and shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(3) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26.03 and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

23 Rule 26.02. Discovery, Scope and Limits

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(a) In General.

Parties may obtain discovery regarding any matter, not privileged, that is relevant to a claim or defense of any party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information sought need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

(b) Limitations.

(1) The court may establish or alter the limits on the number of depositions and interrogatories and may also limit the length of depositions under Rule 30 and the number of requests under Rule 36. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26.03.

(2) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26.02(b)(3). The court may specify conditions for the discovery.

(3) The frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit,

taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26.03.

(c) Insurance Agreements.

In any action in which there is an insurance policy that may afford coverage, any party may require any other party to disclose the coverage and limits of such insurance and the amounts paid and payable thereunder and, pursuant to Rule 34, may obtain production of the insurance policy; provided, however, that this provision will not permit such disclosed information to be introduced into evidence unless admissible on other grounds.

(d) Trial Preparation: Materials.

Subject to the provisions of Rule 26.02(e) a party may obtain discovery of documents and tangible things otherwise discoverable pursuant to Rule 26.02(a) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a party or other person may obtain without the required showing a statement concerning the action or its subject matter previously made by that person who is not a party. If the request is refused, the person may move for a court order. The provisions of Rule 37.01(d) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (1) a written statement signed or otherwise adopted or approved by the person making it, or (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, that is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(e) Trial Preparation: Experts.

Discovery of facts known and opinions held by experts, otherwise discoverable pursuant to Rule 26.02(a) and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(1)(A) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (B) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to Rule 26.02(e)(3), concerning fees and expenses, as the court may deem appropriate.

(2) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35.02 or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(3) Unless manifest injustice would result, (A) the court shall require the party seeking discovery to pay the expert a reasonable fee for time spent in responding to discovery pursuant to Rules 26.02(e)(1)(B) and 26.02(e)(2); and (B) with respect to discovery obtained pursuant to Rule 26.02(e)(1)(B), the court may require, and with respect to discovery obtained pursuant to Rule 26.02(e)(2) the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(f) Claims of Privilege or Protection of Trial Preparation Materials.

(1) When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(2) If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

24 At page 329 the Court stated:

In the instant case there is discrimination among those who are similarly situated. All nonresident applicants for a license to engage in warm air heating, ventilation, and general sheet metal work are not treated alike under the ordinance. Those nonresidents coming from cities which have license requirements compelling a St. Paul resident to maintain a place of business in that city are forced to maintain a place of business in St. Paul in order to obtain a St. Paul license. On the other hand, a similar nonresident coming from a city which does not require nonresidents to maintain a place of business therein to qualify for a license would not have to maintain a place of business in St. Paul in order to obtain a St. Paul license. Clearly, the statute does not operate uniformly on all nonresident applicants for the same license. Thus, when a municipal ordinance imposes restrictions upon one class of persons engaged in a particular business which are not imposed upon others engaged in the same business and under similar circumstances, there is a violation of the equal protection clause, thereby rendering the ordinance unconstitutional.

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